https://www.splcenter.org/hatewatch/2020/01/10/white-nationalists-and-neo-nazis-applaud-recent-spate-antisemitic-attacks; Dan Mangan, *Hate Crimes Against Asian and Black People Rise Sharply in the U.S., FBI Says*, CNBC, Aug. 30, 2021, https://www.cnbc.com/2021/08/30/fbi-says-hate-crimes-against-asian-and-black-people-rise-in-the-us.html; Masood Farivar, *US Hate Crimes Rise During First Half of 2022*, VOA News, Aug. 23, 2022, https://www.voanews.com/a/us-hate-crimes-rise-during-first-half-of-2022-/6713791.html; Audra D.S. Burch and Luke Vander Ploeg, *Buffalo Shooting Highlights Rise of Hate Crimes Against Black Americans*, The New York Times, May 16, 2022, https://www.nytimes.com/2022/05/16/us/hate-crimes-black-african-americans.html.

The Galapos' signs directly comment on racism and antisemitism—two issues that are extremely important to them. *See, e.g.,* R.R. at 3 ("No Place 4 Racism"). Because these signs comment on important matters of public interest and concern, they are the type of speech entitled to the highest forms of protection that the Constitution provides. *See Dun & Bradstreet*, 472 U.S. at 759; *N.Y. Times Co.*, 376 U.S. at 270. The Galapos are a Jewish family living in a cultural climate where antisemitic hate and hate-driven attacks are on the rise. Their next-door neighbors, the Oberholzers, repeatedly verbally attacked them with antisemitic hate speech and intimidating antisemitic behavior. *See, e.g.*, R.R. at 148, 149, 151, 153,

155. They were called, "fucking Jew[s]" and "fucking Jewish kids." *Id*. at 148, 149. In response to this racist behavior—with full understanding of the cultural context and moment they were living in—the Galapos decided to place anti-hate messaging signs in their yard, directed at the Oberholzers' property. *See id.* at 3-8, 149, 152, 153, 155. In doing so, the Galapos were engaging in an American tradition of using their property to protest racism and hate.[5]

The Galapos' signs are the precise type of speech—speech that is important to the public and of public concern—that the Court labeled on the "highest rung of the hierarchy of First Amendment values and . . . entitled to special protection." *Dun*, 472 U.S. at 759. Therefore, any restriction to that speech—i.e. the trial court's injunction—must be subject to strict scrutiny.

3. The injunction does not serve a compelling state interest and cannot survive strict scrutiny.

Because the trial court's injunction is content-based, it may not remain in place if it cannot "survive strict scrutiny." *Reed*, 576 U.S. at 171. Strict scrutiny "requires the . . . [trial court to find] that the restriction furthers a compelling [state] interest and is narrowly tailored to achieve that interest." *Id.* (quoting

[5] *See, e.g., History of Lynching in America*, NAACP, https://naacp.org/find-resources/history-explained/history-lynching-america (discussing the flag flown at NAACP's national headquarters in New York from 1920 to 1938 that read "A MAN WAS LYNCHED YESTERDAY").

Arizona Free Enterprise PAC v. *Bennett*, 564 U. S. 721, 734 (2011) (internal quotations omitted)). The injunction here does not serve a compelling state interest.

Appellants acknowledge that protecting a person's right to privacy in their home is a legitimate state interest. *See, e.g., Frisby*, 487 U.S. at 484; *Gregory v. Chicago*, 394 U.S. 111, 125 (1969). And the Court has recognized that as captive listeners in their homes, people may keep "unwanted speech" out of their homes, and "the government may protect . . . [that] freedom." *Frisby* 487 U.S. at 485 (citing, among others, *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-749 (1978) (offensive radio broadcasts); *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970) (offensive mailings); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (sound trucks)).

However, no residential privacy interest is served by the injunction here. A neighbor's posting of signs in their yard is not conduct typically considered in the "captive audience" analysis. *See, e.g., Frisby*, 487 U.S. at 485 (collecting cases). The court cannot simply "[d]esignate . . . conduct [as] an invasion of privacy" to justify "an injunction against [the] peaceful . . . [dissemination] of information[]," as the court did here. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971). The lower court concluded that the placement of signs on the Galapos' property facing the Oberholzers' home, was an "invasion of privacy"—but that conclusion "is not sufficient to support" this injunction. *Id*. The Galapos have not invaded the privacy of the Oberholzers' home. They have merely placed signs on

their own property, R.R. at 3, not on the Oberholzers' property. The Galapos have not stepped foot on the Oberholzers' property, put anything in their home, nor attempted to go into their home. *Id.* at 3-8. The Galapos have not brought large groups of people to the Oberholzers' home or made loud or threatening noises directed at them. *Id.* The Galapos' conduct was peaceful and proper. *See Keefe*, 402 U.S. at 419; *see also* R.R. at 3-8.

There are many actions that the Oberholzers may take that do not implicate the Galapos' Constitutional rights if they do not wish to see the signs. They may stay inside of their house, spend more time in their front yard, build a fence, or avert their eyes. These responses do not require the court to unlawfully regulate the free expression of the Galapos on their own private, residential property.

Of course, the town could regulate the usage of signs in a content-neutral manner if they wish, but that has not happened here. *See Reed*, 576 U.S. at 173; *City of Ladue*, 512 U.S. at 48. Targeted residential picketing may be regulated by municipal governments. *See, e.g., Frisby*, 487 U.S. at 477 (upholding town's ordinance that banned residential picketing). However, there are stark differences between ordinances passed by democratically elected legislative bodies and an injunction imposed by a single trial court judge. *See Madsen v. Women's Health Ctr.*, 512 U.S. 753, 764 (1994). An ordinance "represent[s] a legislative choice that promot[es] . . . particular societal interests." *Id*. Conversely, injunctions serve as

"remedies imposed for violations (or threatened violations) of a legislative or judicial decree . . . and carry greater risks of censorship and discriminatory application than do general ordinances." *Id*. It follows that an injunction, such as the one here, should be more heavily scrutinized than an ordinance. *See id.*

Ultimately, this is not a case of residential picketing, but a case of private residents posting signs of social import on their own private property. R.R. at 151, 153. The conduct of the Galapos is distinguishable from the conduct of a residential picketer in cases where courts have upheld residential picketing restrictions. In *Frisby*, the Court upheld a town's blanket ban on residential picketing enacted to combat anti-abortion protestors targeting the home of an abortion provider. 487 U.S. at 477. There, the court emphasized that, at times, more than 40 protestors were picketing outside of the doctor's house, "harassing" the doctor's family, having a "devastating effect . . . on the quiet enjoyment of the home," and that this type of targeted residential picketing transformed the residents into a "captive" audience. *Id.* at 480, 486, 487. The Galapos' conduct is not analogous to that of the protestors in *Frisby*. The Galapos have not harassed their neighbors nor "devast[ed]" their "quiet enjoyment of the home." They have not invaded the Oberholzers residential privacy. *See* R.R. at 3-8. They are a small nuclear family posting signs on their own property. *See id.* They are not bringing other people to the home of the Oberholzers. *See id.* They are not harassing the

Oberholzers. *See id.* They are doing nothing to curtail the Oberholzers' "quiet enjoyment of the[ir] home." *Frisby*, 487 U.S. at 486. The Galapos have only placed signs on *their own* lawn. *See* R.R. at 3-8. Therefore, the justification for the injunction—that the Oberholzers' residential privacy was invaded—is incorrect and there is *no* compelling state interest in restricting the property and free speech rights of the Galapos. Thus, the injunction fails the test of strict scrutiny.

II. CONCLUSION

For the reasons stated herein, this Honorable Court should reverse the Superior Court's decision and vacate the injunction.

Respectfully submitted,

/s/ Don Arrington
Don Arrington

Applicant Details

First Name	**P.J.**
Last Name	**Austin**
Citizenship Status	**U. S. Citizen**
Email Address	**p.j.austin@duke.edu**
Address	**Address** **Street** **2711 E Shoreham St** **City** **Durham** **State/Territory** **North Carolina** **Zip** **27707-2959** **Country** **United States**
Contact Phone Number	**5627283126**

Applicant Education

BA/BS From	**University of California-Santa Barbara**
Date of BA/BS	**December 2018**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 7, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Duke Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Richman, Barak D.
richman@law.duke.edu
919-613-7244
Hall, Jason
jhall@cahill.com
Siegel, Neil S.
Siegel@law.duke.edu
919-613-7157

This applicant has certified that all data entered in this profile and any application documents are true and correct.

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May 27, 2023

The Honorable Juan R. Sanchez
United States District Court for the Eastern District of Pennsylvania
601 Market Street
Philadelphia, PA 19106

Dear Judge Sanchez,

I am writing to apply for a clerkship in your chambers for the 2024–2025 term. I am a recent graduate of Duke University School of Law. This fall, I will be a first-year associate in Cahill Gordon & Reindel's New York office.

I believe I have the research and writing skills to excel as your clerk. While at Duke Law, I have enhanced my legal skills by competing in moot court competitions, participating in Duke's Appellate Practice course, and working as a research editor for the Duke Law Journal. Last spring, I coauthored an essay about Black farmers, entitled *Rattlesnakes, Debt, and ARPA § 1005: The Existential Crisis of American Black Farmers*, which the Duke Law Journal Online published. During the summer of 2021, I interned for Judge Mary Ellen Coster Williams of the Court of Federal Claims in Washington, DC. In this role, I worked closely with the judge and her clerks and saw firsthand the importance of thorough research, clear writing, and collaboration.

Letters of recommendation on my behalf can be sent by Duke from the following individuals:

Professor Neil Siegel	Professor Barak Richman	Jason Hall
Duke Law School	Duke Law School	Cahill Gordon & Reindel LLP
(919) 613- 7157	(919) 613-7244	(212) 701-3154
siegel@law.duke.edu	richman@law.duke.edu	jhall@cahill.com

Please let me know if I can provide any other information that would be helpful. Thank you for your time and consideration.

Sincerely,

P.J. Austin

P. J. AUSTIN

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Durham, NC 27707

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(562) 728-3126

6136 Michelson Street
Lakewood, CA 90713

EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor, May 2023
GPA: 3.27
Honors: Duke Law Journal, *Research Editor*
Moot Court, *Board Member*
Activities: Black Law Students Association, *Director of Programming*

University of California, Santa Barbara, Santa Barbara, CA
Bachelor of Arts in Political Science, *with Distinction*, December 2018
GPA: 3.47
Honors: Political Science Honors Program; Gilman Scholar; Dean's Honors
Thesis: *Hobbes's Theory of Obligation Reinterpreted: A Resolution to Apparent Discrepancies*
Study Abroad: Exeter College, Oxford University, United Kingdom, Summer 2018
Activities: Pi Sigma Alpha – National Political Science Honor Society

EXPERIENCE

Professor Barak Richman, Durham, CA
Research Assistant, May 2023 – Present

- Conducted research regarding health care market consolidation and concentration in California.

First Amendment Clinic, Duke Law Clinics, Durham, CA
Legal Intern, January 2023 – April 2023

- Drafted a complaint and motions for litigation regarding defamation and Section 1983.
- Conducted research regarding defamation, public records, statute of limitations, and content moderation.

Cahill Gordon & Reindel, New York, NY
Summer Associate, May 2022 – July 2022

- Conducted research and drafted memos on a variety of issues, including aiding and abetting, securities fraud, and class decertification.
- Drafted motion in limine for upcoming antitrust trial.

The Honorable Mary Ellen Coster Williams, U.S. Court of Federal Claims, Washington, DC
Judicial Intern, June 2021 – July 2021

- Researched legal issues to assist the judge with her review of cases; researched topics such as categorical takings and the validity and enforcement of government contracts.
- Drafted memos summarizing legal findings for efficient review and use by the judge.
- Participated in conferences with the judge and her law clerks on a regular basis to discuss ongoing matters, projects, and needs.

PUBLICATION

Maia Foster & P.J. Austin, *Rattlesnakes, Debt, and ARPA § 1005: The Existential Crisis of American Black Farmers*, 71 DUKE L.J. ONLINE 159 (2022).

ADDITIONAL INFORMATION

Interests: Guitar, Bass, Painting
Other: Dual citizenship (U.S. and Canada), First Generation College and Graduate Student

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UNOFFICIAL TRANSCRIPT
DUKE UNIVERSITY SCHOOL OF LAW

2020 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Civil Procedure	Miller, D.	3.3	4.50
Contracts	Richman, B.	3.4	4.50
Criminal Law	Coleman, J.	3.0	4.50
Legal Analysis, Research, Writing	Strauss, E.	*Credit Only*	0.00
Professional Development	Multiple	*Credit Only*	1.00

2021 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Constitutional Law	Young, E.	2.8	4.50
Torts	Frakes, M.	2.9	4.50
Property	Wiener, J.	3.1	4.50
Legal Analysis, Research, Writing	Strauss, E.	3.2	4.00
Counselor and Client	Buell, E.	*Credit Only*	1.00

2021 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Ethics/Law of Lawyering	Richardson, A.	3.2	2.00
Corporate Crime	Buell, S.	3.3	4.00
Appellate Practice	Andrussier, S.	3.3	3.00
Negotiation	Thomson, C.	3.5	3.00

2022 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Art Law	DeMott, D.	3.3	2.00
Appellate Courts	Levy, M.	3.3	2.00
Federal Courts	Siegel, N.	3.1	4.00
Legislative and Statutory Interpretation	Lemos, M.	3.4	3.00

Structuring and Regulating Financial Transactions	Schwarcz, S.	3.8	3.00

2022 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Evidence	Beskind, D.	3.4	4.00
First Amendment	Benjamin, S.	3.2	3.00
Scholarly Writing Workshop	Thorn, A.	3.4	3.00
Readings (Transgender Issues)	Simmons, A.	CR	1.00
Law & Literature: Race & Gender	Jones, T.	3.5	3.00

2023 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Bankruptcy & Corporate Reorganization	Schwarcz, S.	3.4	2.00
Civil Rights Litigation	Miller, D.	3.3	3.00
First Amendment Clinic	Ludington, S. Martin, A.	3.4	4.00
Jury Decision Making	Bornstein, B.	3.4	2.00
Collective Action Constitution	Siegel, N.	3.5	3.00
Readings (The Administrative State)	Mishchenko, L.	*Credit Only*	1.00

TOTAL CREDITS: 87.00
CUMULATIVE GPA: 3.27

Duke University School of Law
210 Science Drive
Durham, NC 27708

May 31, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: P.J. Austin

Dear Judge Sanchez:

I write to recommend P.J. Austin for a clerkship in your chambers. P.J. was a student in my Fall 2020 Contracts class, and we have since remained in frequent contact. I think he'd be a terrific clerk.

The pandemic made the Fall of 2020 a hard semester for everyone, especially 1Ls, but I was impressed by how resilient and adaptive our class was. P.J. was among those who actively made the most of a difficult situation. In both comments in class and in discussions during office hours, P.J. was actively engaged with the material, and put in enormous time into mastering the material. Despite the virtual setting, I felt like I grew to know him well, and I enjoyed discussing the themes of the class—and law school more generally—during his frequent office hour visits. He worked immensely hard throughout the semester, and I was not surprised that he earned an above-median grade in what was a very talented class.

P.J. is also immensely well-liked by his classmates and the faculty. I noticed during the Fall 2020 semester that he seemed to manage the challenges of isolation well, both seeking out the help he needed for the course and collaborating with classmates to help build the student community. He developed many friends throughout his first year of law school, and I credit students like him for facilitating our school's smooth reintegration to in-person classes. I genuinely enjoy his company, and I've appreciated the additional opportunities I've had to share a meal with him outside of law school regular hours.

I'm confident that P.J. would be a terrific clerk, and I'm delighted that he wants to be one. Too many of our students are preoccupied with starting at a firm, without realizing the richness of the clerkship experience or valuing the public service it entails. P.J. does, and he's clerking for the right reasons. His grades are not as high as our typical clerkship applicant, but that reflects neither the value he'll provide to your chambers nor the benefits he'll accrue from your mentorship. He will be a diligent worker and a terrific team player. He'll invest care and thoroughness into the job, and he'll take pride in the chamber's work.

In short, I hope you consider P.J. for a clerkship. Please feel free to contact me should you wish to discuss his application any further.

Sincerely yours,

Barak D. Richman
Edgar P. and Elizabeth C. Bartlett Professor of Law
Professor of Business Administration

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WRITER'S DIRECT NUMBER

(212) 701-3154

April 25, 2023

Re: Application of P.J. Austin

Dear Judge:

It is my pleasure to provide this letter of recommendation for P.J. Austin as he seeks a role as a judicial clerk in Your Honor's chambers. I served as P.J.'s mentor partner during his time at Cahill last summer, and in that capacity I worked closely with him as we prepared for a jury trial. I have supervised hundreds of associates and summer associates over the years and found P.J. to be one of the best. I recommend him without hesitation.

During P.J.'s time at Cahill, we were in the final stage of trial preparation in a long-running antitrust class action. P.J. quickly became an important member of the team, and I found his work to be extremely impressive.

Among several projects, P.J. got up to speed on complex evidentiary issues and conducted research to support one of our key *in limine* motions relating to subsequent remedial measures. With only minimal guidance and direction, P.J. was able to identify the strongest points and supporting authorities. He designed the argument that ultimately prevailed when the motion was filed. He wrote a polished first draft of the brief that demonstrated his ability to deliver quality work on a tight deadline.

P.J. was undaunted by the massive evidentiary record and long procedural history in the case; he found ways to contribute meaningfully from his first week. He effectively brought to bear his prior experience as a judicial intern, and his insights from case law research, to help us prioritize and reframe legal arguments.

His intellectual curiosity helped us look at familiar problems from a new perspective. He asked insightful questions and seemed genuinely interested in complex legal

issues. More than that, P.J. brought his fresh perspective to our evaluation of the facts and witnesses. As a first generation law student, P.J. was able to look past the "lawyering" to help us evaluate witness testimony that would be powerful with the jury. P.J. impressed me and other members of the team with his intuitive ability to leverage insights from his varied experiences and prior work for our client's benefit.

On a personal level, it was truly a pleasure to have P.J. on our team. He brought tremendous enthusiasm, energy, and a strong work ethic that proved critical as we juggled competing priorities in the lead-up to trial. He looked proactively for ways to contribute and make himself helpful to the effort. He has the rare ability to know when to observe and when to speak up. Those skills served him well at Cahill, as they will serve him well in a busy judicial chambers.

My partners and I were consistently impressed with P.J. and his contributions. I am confident he will be an asset to Your Honor's chambers if he has an opportunity to serve as your law clerk. P.J. has my full and unequivocal recommendation. I would be pleased to answer any questions Your Honor may have.

Yours truly,

Jason M. Hall

Duke University School of Law
210 Science Drive
Durham, NC 27708

May 31, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: P.J. Austin

Dear Judge Sanchez:

I am pleased to recommend P.J. Austin for a clerkship in your chambers. P.J. was a successful student in my Federal Courts class this past spring, and I was sufficiently impressed by him that I agreed to advise his law review note this past fall. I am confident that he will succeed as a law clerk and lawyer.

I regard Federal Courts as one of the most difficult classes that the Law School offers—and as essential for clerking and litigating. Many Duke Law students shy away from the class because of its frightening reputation and potentially negative impact on their GPAs. My course covers challenging subjects: *Marbury* as a federal courts case; congressional control of federal-court jurisdiction; the different justiciability doctrines; the ins and outs of state sovereign immunity; Section 1983 litigation and individual officer immunity; the several abstention doctrines; U.S. Supreme Court review of state-court judgments; and federal habeas-corpus review of state-court criminal convictions and sentences.

P.J. worked extraordinarily hard in the course. He was prepared when I called on him, and he occasionally volunteered to try to tackle my tough questions to the class. Outside of class, he participated actively during office hours by asking about course materials or current legal events such as Texas Senate Bill 8 or the constitutionality of expanding the U.S. Supreme Court. Indeed, he was the student in the class who most effectively critiqued—and thereby helped sharpen—the constitutional arguments I make in a forthcoming law review article on packing the U.S. Supreme Court. I really enjoyed having lunch with several of his classmates and him toward the end of the semester.

I fully expect that P.J. will fit in well in the close confines of chambers. He is calm, hard-working, mature, respectful, resilient, unassuming, and well-liked by his professors and peers. He is an absolute pleasure to be around. Unsurprisingly, he received a return offer from his law firm immediately upon completing its summer associate program.

I was recently appointed the Associate Dean for Intellectual Life at the Law School, so this year I have even less time than usual to take on additional responsibilities. Even so, I could not resist saying yes when P.J. asked if I would advise his law review note this past fall. He is just so hard-working and likeable, and he cares about legal and policy questions that matter. He will also add critically needed diversity to the legal profession, including to the group of law clerks that our nation's law schools produce each year.

Please feel free to contact me if I can be of additional help as you consider P.J.'s application. I would be pleased to speak with you about him.

Sincerely yours,

Neil S. Siegel
David W. Ichel Professor of Law and Political Science
Associate Dean for Intellectual Life
Director, Duke Law Summer Institute on Law and Policy

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WRITING SAMPLE

The attached writing sample is a memorandum that I wrote for my judicial internship with Judge Mary Ellen Coster Williams in the summer of 2021. In the memo, I was asked to address whether the plaintiff's torts claims were barred by the statute of limitations. No other person aided in the preparation of this memorandum. The party names and locations have been altered for confidentiality.

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MEMORANDUM

TO: Senior Judge Mary Ellen Coster Williams
FROM: P.J. Austin
CC: Alex Prime
DATE: July 28, 2021
RE: Are QC's tort claims barred by the statute of limitations?

Question Presented

Are QC's tort claims barred by the statute of limitations?

Brief Answer

Likely not. Generally, the statute of limitations period in Massachusetts is three years for tort claims. However, Massachusetts courts have adopted a discovery rule which provides that the state of limitation begins to run when a plaintiff knows or reasonably should know that she may have been harmed by a defendant's conduct. Alternatively, courts do not enforce the statute of limitations where the statements lulled the plaintiff into the false belief that it was not necessary for him to commence action within the statutory period of limitations. Here, QC did not discover RED's involvement in drafting the request for proposals ("RFPs") until 2016. Further, RED and ABC Agency appeared to work in tandem to reassure QC that it would be made whole by equitable adjustment. Therefore, QC torts claims were equitably tolled and fall within the statute of limitations period.

Facts

Plaintiff QUALITY CONSTRUCTION ("QC") brought action against Defendant RED International Inc. ("RED") for tort claims in relation to a contract between QC and the United States ABC Agency ("ABC"). Compl. Against RED Int'l Inc. ("D.C. Comp.") at 1, ECF No. 1.

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In late 2014, QC entered into the Schools Contract and the Clinic Contract ("Contracts") with ABC Agency to prepare final designs for the rebuilding of multiple schools and a health clinic in Costa Rica after Tropical Storm Sarah. *Id.* at 10–11. In accordance with a prior contract between RED and ABC Agency, RED was to be the Architectural Engineer ("A/E") for the Contracts' projects. *Id.* at 5.

Now, QC alleges RED conducted itself in a way that warrants tortious liability. QC submits claims of tortious interference, misrepresentation, civil conspiracy (coercive and concerted action), and unjust enrichment. *Id.* at 37–41. The alleged tortious behavior began with RED's part in drafting amendments to the Schools RFPs in 2014, which QC alleges were misrepresented and induced their bid. QC's Mem. in Opp'n. to Def. RED Int. Inc.'s Mot. Summ, J. ("QC's Resp. to MSJ") at 17, ECF No. 92; Resp. of Pl. QC to Rev. Stmt. Mat. Facts in Supp. of Def. RED Int. Inc.'s Mot. Summ. J. ("QC's Resp. to SMF") at 35, ECF No. 93. The amendments to the RFPs stated that all ancillary permits and property titles would be provided and presented no legal issues. QC's Resp. to MSJ at 17, ECF No. 92.

However, all permits were not provided and the property titles did have legal issues. *Id.* QC claims it was not aware that RED had participated in drafting the amendments to the RFPs until it received information through the Freedom of Information Act ("FOIA") requests. QC's Resp. to SMF at 18, ECF No. 93. Therefore, QC is arguing that it was unaware that RED was partially responsible for the alleged harm and the statute of limitations period should begin when QC discovered that information through the FOIA requests. QC's Resp. to MSJ at 11, ECF No. 92.

Further, during QC's performance of the Contracts, QC claims that it was continuous impeded by RED. QC alleges RED intentionally submitted defective preliminary designs and

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used its role as A/E to deflect blame and costs onto QC. Mem. and Order ("Saris' Order") at 5, ECF No. 30. QC initially sought remedy through administrative procedures by filing requests for equitable adjustments. QC's Resp. to MSJ at 6, ECF No. 92. QC alleges that it believed it may have been made whole from the adjustments based on representations from RED and ABC Agency and therefore, postponed filing suit to against them. QC's Resp. to MSJ at 6, ECF No. 92. In response to QC's requests for equitable adjustment, the Contracting Officer ("CO") issued his final decisions on October 15, 2018. QC was not satisfied with the CO's judgment and filed suit on November 9, 2018 against RED and ABC Agency. *Id.*

Discussion

Generally, the statute of limitations period in Massachusetts is three years for tort claims. Mass. Gen. Laws ch. 260, § 2A; *RTR Tech., Inc. v. Helming*, 707 F.3d 84, 89 (1st Cir. 2013). Usually, a plaintiff's cause of action begins accrues at the time of his injury. *Id.* However, Massachusetts courts have adopted a discovery rule which provides that "a cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or reasonably should know that she may have been harmed by a defendant's conduct, even if the harm actually occurred earlier." *Id.*; *See also Keane, Inc. v. Swenson*, 81 F.Supp.2d 250, 255 (D. Mass. 2000).

The discovery rule only applies to plaintiff's injuries that were "inherently unknowable." *RTR Tech.*, 707 F.3d at 90. A "plaintiff need not know the extent of the injury or know that the defendant was negligent for the cause of action to accrue." *Id.* (quoting *Williams v. Ely*, 423 Mass. 467 (1996)). Plaintiff need only know that he sustained an appreciable harm as a result of the defendant's conduct. *Id.* Factual disputes regarding when the plaintiff knew or should have known are typically submitted to a factfinder, unless admitted or undisputed facts allow a

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determination as a matter of law. *Salois v. Dime Sav. Bank of New York, FSB*, 128 F.3d 20, 26 (1st Cir. 1997).

Additionally, when a plaintiff fails to bring timely claims based reasonable reliance on representations by defendant regarding a settlement, courts do not enforce the statute of limitations where the representations "lulled the plaintiff into the false belief that it was not necessary for him to commence action within the statutory period of limitations." *Deisenroth v. Numonics Corp.*, 997 F.Supp. 153, 157 (D. Mass. 1998) (Saris opinion) (internal quotations omitted). Under the Contracts Dispute Act, a plaintiff is required to "exhaust available administrative remedies by first submitting a 'claim'[1] to and obtaining a 'final decision' from the contracting officer." *Sarang*, 76 Fed.Cl. at 564 (citing 41 U.S.C. § 605(a)). Courts have recognized that a plaintiff may be entitled to equitable tolling of the statute of limitations while its exhausting administrative remedies. *Dillon v. Dickhaut*, 2013 WL 2304175, at *4 (D. Mass. May 24, 2013). *Contra Holloman v. Clarke*, 208 F.Supp.3d 373, 378 (D. Mass. 2016) (noting the First Circuit has not "determined whether federal or state equitable tolling principles apply").

This memorandum will begin by addressing the application of the First Circuit's statute of limitations doctrine to (1) the RFP amendments. Then, the memorandum will address the

[1] "Claim" is undefined by the CDA. *See Sarang Corp. v. United States*, 76 Fed.Cl. 560, 564 (2007) (citing 41 U.S.C. § 605(a)). The term is defined in the Federal Acquisition Regulations as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 C.F.R. § 52.233–1(c).

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application of the doctrine to (2) the remaining claims and whether there is a possibility that the claims will be equitably tolled.

I. Here, a reasonable jury will likely hold that its claims regarding the misrepresentations in the RFP amendments were equitably tolled per the discovery rule.

QC alleges it became aware of its alleged injury regarding the misrepresentations in the amended RFPs within months of signing the Contracts in 2014. QC's Resp. to MSJ at 11, ECF No. 92. Therefore, the time of QC's injury would fall outside of the statute of limitation's three-year period because it occurred before November 9, 2015 (3 years before the current action commenced on November 9, 2018). *See RTR Tech.*, 707 F.3d at 89.

However, QC correctly alleges that period is tolled by the discovery rule. *See Puritan Med. Ctr. v. Cashman*, 413 Mass. 167, 175 (1992). The question of whether QC exercised reasonable diligence and should have known RED's partial role in drafting the RFPs amendments is not so clear cut as to permit a determination as a matter of law. *See Salois*, 128 F.3d at 26. Unlike the plaintiff in *Salois*, the documents provided to QC did not contain the relevant information. *See id.*

Still, RED could argue that QC's should have exercised diligence by inquiring into RED's involvement at the time since it was notifying ABC Agency of defects in the preliminary designs provided by RED. However, if the question is submitted to a factfinder, he could find it was "inherently unknowable" that RED helped draft the amendments to the RFP given the information provided to QC at the time of the injury. *See id.* Therefore, a reasonable jury could find that QC's misrepresentation claims regarding the amendments to the RFPs are timely because the limitations period is tolled until 2016 when QC discovered RED's role in drafting the statements. *See RTR Tech.*, 707 F.3d at 89.

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II. Regarding the remaining claims, a reasonable jury will likely find that QC's tort claims are equitably tolled until the CO issued its final decision on October 15, 2018.

Here, a reasonable jury will likely find that QC's remaining tort claims are equitably tolled until the CO issued its final decision on October 15, 2018. The parties argue alternate timelines regarding when QC allegedly suffered appreciable harm sufficient to trigger the statute of limitations period.[2] Rev. Mem. in Supp. of Def. RED Int. Inc.'s Mot. Summ. J.("RED's MSJ") at 20, ECF No. 86; QC's Resp. to MSJ at 15, ECF No. 92. Accordingly, despite RED's contention that the issue is clearly in their favor, there is a factual dispute regarding when QC suffered its alleged appreciable harm.

In relation to all its claims, QC provides a few examples of case law where it was debatable whether there was sufficient evidence to show the plaintiff knew or should have known it suffered appreciable harm at the time of the alleged tort. QC's Resp. to MSJ at 6, ECF No. 92. QC argues that it is possible that it may have been "made whole" and not have suffered appreciable harm because of equitable adjustments to the contract. QC's Resp. to MSJ at 6, ECF No. 92. Therefore, it argues harm the injury did not accrue until a final decision was made by the CO. QC's Resp. to MSJ at 6, ECF No. 92. However, utilizing the reasoning within two cases QC cites to prove this argument, the potential for equitable adjustments does not

[2] RED argues that appreciable harm for QC's alleged tort claims accrued in late-2014 or by August 27, 2015 since it claims QC believed it had been seriously wronged by the combined actions of ABC Agency and RED by that time. RED's MSJ at 20, ECF No. 86. QC argues that the appreciable harm could not have accrued until at least April 2016 "when it began to suffer harm beyond the increased project costs which QC was entitled to recover via equitable adjustment and which were subject to ongoing negotiations with ABC Agency." QC's Resp. to MSJ at 7, ECF No. 92.

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necessarily bar an accrual until the final decision is rendered by the CO because a reasonable jury could possibly find measurable harm before the final decision.[3]

For example, the following hypothetical is a situation where a reasonable jury could find appreciable harm when QC discovered defects in the preliminary designs in 2014. Here, since QC has demonstrated intentions to quantify the extent the preliminary designs were inadequate, expert testimony could be utilized to approximate a measurable detriment at the time QC alleged the defects existed in 2014. *See id.* at 268–69. Accordingly, since QC alleged a vast number of defects in 2014, a reasonable fact finder could find that QC could have reasonably foresaw that its damages would surpass any equitable adjustment available to it under any administrative remedy. *See id.* at 268–69.

Regarding QC's other alleged occurrences of harm in its torts claims, using similar reasoning to find measurable harm would be more difficult. For example, quantifying appreciable harm regarding RED's alleged delays in the approval of final designs under QC's tortious interference claim would be more difficult. QC's Resp. to MSJ at 5–6, ECF No. 92. Therefore, a jury may reasonably find that the other alleged tortious actions only caused appreciable harm when QC began to suffer harm beyond the increased project costs as QC argues. *See Salois*,128 F.3d at 26.

[3] The court in *Boston Prop.* recognized that a measurable detriment satisfies plaintiff's knowledge of an appreciable harm. *Boston Prop. Exch. Transfer*, 686 F.Supp.2d 138, 145–46 (D. Mass. 2010). Moreover, the court in *Mass. Elec.* recognized that an appreciable harm occurred before the extent of the harm was determined when filing a law suit clearly would result in the incurrence of substantial expenses. *Mass. Elec. Co. v. Fletcher, Tilton & Whipple, P.C.*, 394 Mass. 265, 268–69 (1985).

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a. A reasonable jury may find the torts claims are not necessarily tolled until all administrative remedies are exhausted.

Here, QC argues that its claims must be equitably tolled until all administrative remedies were exhausted. QC's Resp. to MSJ at 13, ECF No. 92. However, to support this conclusion, QC cites case law which is not binding on the First Circuit. QC's Resp. to MSJ at 13, ECF No. 92. In contrast to QC's case law, the court in *Holloman* noted that the First Circuit has not "determined whether federal or state equitable tolling principles apply." *Holloman*, 208 F.Supp.3d at 378. Therefore, a reasonable jury could determine QC's claims were not tolled during the time QC sought administrative remedies.

b. A reasonable jury may find that RED's conduct in tandem with ABC Agency is sufficient to constitute the necessary "lulling" that would grant QC equitable tolling.

Alternatively, a reasonable jury may find that the statute of limitation period must be tolled because RED and ABC Agency "lulled the plaintiff into the false belief that it was not necessary for him to commence action within the statutory period of limitations." *See Deisenroth*, 997 F.Supp. at 157. QC alleges that it engaged with both ABC Agency and RED in its request for equitable adjustment. QC's Resp. to MSJ at 14, ECF No. 92. Further QC alleges that ABC Agency represented to QC that it would consider its submissions in good faith and award equitable adjustments that were justified and reasonable. QC's Resp. to MSJ at 14, ECF No. 92. However, QC claims ABC Agency relied on recommendations from RED that were not based on architectural or engineering standards, and consequently did not provide fair and equitable solutions. *See* QC's Resp. to MSJ at 14, ECF No. 92. Accordingly, a reasonable jury may find that RED's conduct in tandem with ABC Agency is sufficient to constitute the necessary "lulling" and therefore equitably toll QC's accrual of injury. *See Deisenroth*, 997

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F.Supp. at 157. However, because QC only dealt with ABC Agency directly and RED only tangentially as an advisor of ABC Agency during the equitable remedy proceedings, a reasonable jury may alternatively find that RED did not lull QC into any false belief regarding commencing an action, which would mean QC's claims were not tolled. *See id.*

Conclusion

For the foregoing reasons, QC's torts claims likely fall within the statute of limitation period.

Applicant Details

First Name	**Hayfa**
Last Name	**Ayoubi**
Citizenship Status	**U. S. Citizen**
Email Address	**hayoubi@unc.edu**
Address	**Address** **Street** **1300 FORDHAM BLVD APT 408** **City** **CHAPEL HILL** **State/Territory** **North Carolina** **Zip** **27514** **Country** **United States**
Contact Phone Number	**9804284901**

Applicant Education

BA/BS From	**Pennsylvania State University-University Park**
Date of BA/BS	**August 2019**
JD/LLB From	**University of North Carolina School of Law** **https://law.unc.edu/**
Date of JD/LLB	**May 1, 2024**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**NC Journal of Law & Technology**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Rosellini, Skyler
rosellini@healthlaw.org
Scardulla, Annie
scardull@email.unc.edu
985-320-7797

This applicant has certified that all data entered in this profile and any application documents are true and correct.

1300 Fordham Blvd, Apt 408
Chapel Hill, NC 27514

June 12, 2023

The Honorable Juan R. Sanchez
United States District Court for the Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Sanchez,

I am a rising third-year student at the University of North Carolina School of Law and the executive editor of the North Carolina Journal of Law & Technology. I am writing to apply for a 2024-2025 clerkship with your chambers.

After completing Judicial sentencing, a class that explores the sentencing guidelines in North Carolina and the North Carolina Structured Sentencing Act, I developed a deeper understanding of the judge's role in the administration of justice. I especially enjoyed participating in the sentencing workshops during which I discussed different criminal cases with North Carolina judges and learned about their sentencing policies and philosophies. I believe that a clerkship is a great experience to learn more about the judicial process, refine my writing and research skills, and work with experienced judges and lawyers on complex legal issues.

As an aspiring litigator with federal litigation experience, I believe I would be a great addition to your chambers. My work experience reflects my commitment to tackling social justice issues and refining the skills that will make me a great advocate and judicial clerk. This summer, I am interning with the criminal justice advocacy clinic at Yale where I am assisting the team with drafting pleadings and preparing for a *Schlup* evidentiary hearing in the United States District Court for the Middle District of Alabama. In addition to my work experience, I have developed solid legal research and writing skills as a staff member on the North Carolina Journal of Law & Technology. My piece which explores the concept of inventorship in patent law was published in January 2023.

A resume, transcript, and writing sample are enclosed. Please let me know if I can provide any additional information. I can be reached by phone at (980)428-4901 or by email at hayoubi@unc.edu. Thank you for your consideration.

Respectfully,

Hayfa Ayoubi
Candidate for Juris Doctor 2024

HAYFA AYOUBI
1300 Fordham Blvd., Apt. 408, Chapel Hill, NC 27514
(980)428-4901 | hayoubi@unc.edu

EDUCATION

University of North Carolina School of Law, Chapel Hill, North Carolina
Juris Doctor, expected May 2024

- Honors & Activities: Executive Editor, *North Carolina Journal of Law & Technology Vol. 25*
  Kilpatrick Mock Trial Competition, Semifinalist and best advocate
- Publications: Hayfa Ayoubi, *Artificial vs. Natural: Should AI Systems Be Named as Inventors on Patent Applications?,* N.C. J. L. & TECH., Dec. 2022, at 1.
- Pro Bono: Cancer Clinic, Immigration Clinic, Expunction Project, Innocence Project, and Medicaid Appeals Project

Pennsylvania State University, University Park, Pennsylvania
Bachelor of Arts, Dual Degrees: Psychology and Law & Society, August 2019

- Phi Delta Phi (International Legal Honor Society), *Treasurer*

EXPERIENCE

Criminal Justice Advocacy Clinic- Yale Law School, New Haven, CT
Fellow, May 2023- Current

- Conducted research and assisted with drafting pleadings for a *Schlup* evidentiary hearing.
- Assisted with the advocacy for an individual with mental health conditions.

The National Health Law Program
Extern, January 2023- April 2023

- Drafted memos on federal privacy laws, medical loss ratio, independent medical review, and journalist's shield law and a blog post on Medicaid doula care.

O'Neill Institute for National & Global Health Law, Washington, D.C.
Addiction Policy Intern, May 2022- July 2022

- Researched and drafted memos on various issues relating to addiction policy and the law

Muslim American Society of Charlotte-Youth Division, Charlotte, North Carolina
Director, August 2019-June 2021

- Led community service, social activities, and fundraisers for the youth group.

CVS Pharmacy, Huntersville, North Carolina
Pharmacy Technician, September 2020-February 2021

Doital USA, Inc., Charlotte, North Carolina
Office Assistant for Property Manager, August 2019-March 2020

Mecklenburg County Court-Family Court Administration, Charlotte, North Carolina
Legal Intern, January 2019-April 2019

- Assisted the SelfServe Center staff and the Family Court staff

PUBLICATIONS

Hayfa Ayoubi, *When Desperate Times Should NOT Call for Desperate Measures: Fourth Amendment Protections Against (Unreasonable) Digital Surveillance that Became Standard Practice During the Pandemic*, N.C. J. L. & TECH. BLOG (Oct. 12, 2022).

Hayfa Ayoubi & Karishma Trivedi, How the Dobbs Ruling Will Affect People with Substance Use Disorder, BILL OF HEALTH BLOG (Aug. 16, 2022).

INTERESTS

Biking, boot camps, kickboxing, card games, and board games

Seq Nbr 1

ID 730500035 Hayfa Ayoubi

Internal Unofficial Transcript - UNC Chapel Hill

Pro Bono Program: 75+ Hours of Service

Name : Hayfa Ayoubi

Student ID: 730500035

Print Date : 2023-06-10

- - - - - Academic Program History - - - - -

Program : SL Juris Doctor

2021-06-25 : Active in Program

2021-06-25 : Law Major

- - - - - Beginning of School of Law Record - - - - -

2021 Fall

LAW	201	CIVIL PROCEDURE	4.00	4.00	B-	10.800
LAW	205	CRIMINAL LAW	4.00	4.00	B	12.000
LAW	209	TORTS	4.00	4.00	B-	10.800
LAW	295	RES,REAS,WRIT,ADVOC I	3.00	3.00	B	9.000
	TERM GPA : 2.840	TERM TOTALS :	15.00	15.00		42.600
	CUM GPA : 2.840	CUM TOTALS :	15.00	15.00		42.600

2022 Spr

LAW	204	CONTRACTS	4.00	4.00	B	12.000
LAW	207	PROPERTY	4.00	4.00	B	12.000
LAW	234A	CONSTITUTIONAL LAW	4.00	4.00	B	12.000
LAW	296	RES,REAS,WRIT,ADVOC II	3.00	3.00	B+	9.900
	TERM GPA : 3.060	TERM TOTALS :	15.00	15.00		45.900

	CUM GPA :	2.950	CUM TOTALS :	30.00	30.00		88.500

2022 Sum I

SUOP	700	SUMMER INTERNSHIP & RESEARCH		0.00		NE	
	TERM GPA :	0.000	TERM TOTALS :	0.00	0.00		0.000
	CUM GPA :	2.950	CUM TOTALS :	30.00	30.00		88.500

2022 Fall

LAW	220	ADMINISTRATIVE LAW		3.00	3.00	A-	11.100
LAW	242	EVIDENCE		4.00	4.00	B	12.000
LAW	266	PROF RESPONSIBILITY		2.00	2.00	B	6.000
LAW	398	HUMAN RIGHTS POLICY LAB		4.00	4.00	B+	13.200
	TERM GPA :	3.254	TERM TOTALS :	13.00	13.00		42.300
	CUM GPA :	3.042	CUM TOTALS :	43.00	43.00		130.800

2023 Spr

LAW	206	CRIM PRO INVESTIGATION		3.00	3.00	B+	9.900
LAW	301	LEGISLATIVE ADVOCACY		2.00	2.00	A-	7.400
LAW	358	JUDICIAL SENTENCING		3.00	3.00	B+	9.900
LAW	443	COMMERCIAL ARBITRATION		3.00	3.00	B+	9.900
LAW	500	EXTERNSHIP		6.00	6.00	PS	
	TERM GPA :	3.373	TERM TOTALS :	17.00	17.00		37.100
	CUM GPA :	3.109	CUM TOTALS :	60.00	60.00		167.900

2023 Sum I

SUOP	700	SUMMER INTERNSHIP & RESEARCH		0.00		NE	
	TERM GPA :	0.000	TERM TOTALS :	0.00	0.00		0.000
	CUM GPA :	3.109	CUM TOTALS :	60.00	60.00		167.900

2023 Fall

LAW	244	FAMILY LAW	3.00			
LAW	311	SUPREME COURT PROGRAM	3.00			
LAW	430	TRUSTS AND ESTATES	3.00			
LAW	465	CURRENT ISSUES LAW & MEDICINE	3.00			
LAW	516	CONTRACT DRAFTING	3.00			
TERM GPA :	0.000	TERM TOTALS :	0.00	0.00	0.000	
CUM GPA :	3.109	CUM TOTALS :	60.00	60.00	167.900	

2024 Spr

LAW	228	BUSI ASSOCIATIONS	4.00			
LAW	426	COMPLEX CIVIL LITIGATION	3.00			
LAW	451	HEALTH LAW ORGANIZATION	3.00			
LAW	468	REGULATION AND DEREGULATION	3.00			
LAW	545	PROSECUTOR PRACTICUM	2.00			
TERM GPA :	0.000	TERM TOTALS :	0.00	0.00	0.000	
CUM GPA :	3.109	CUM TOTALS :	60.00	60.00	167.900	

Cancel

June 2, 2023

RE: Letter of Recommendation

Dear Hiring Manager:

My name is Skyler Rosellini and I am a Senior Attorney and intern coordinator with the National Health Law Program. I supervised Hayfa while she externed with NHeLP during the spring semester of 2023. I am writing this letter as a recommendation for Hayfa. I believe that her work ethic, her analytical and writing skills, and her ability to work through a diverse range of complex legal issues will make her an effective law clerk.

During her externship with NHeLP, Hayfa worked on a diverse range of projects related to health access. Projects included access to mental health, reproductive and sexual health, and dental services. Specifically, she drafted memoranda on federal health privacy laws as they apply to states, medical loss ratios related to dental services, the independent medical review process and how to expand in counties with more limited health plan appeal avenues, and the California "shield law" in the context of journalists' privacy with certain unpublished materials. She also consistently monitored *amicus curiae* efforts in cases related to low-income health care programs for our ongoing litigation efforts related to health access. Hayfa also drafted a publication on Medicaid coverage of doula care, which is a prominent health policy issue and a core part of our reproductive and sexual health substantive priorities. Her

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www.healthlaw.org

publication was shared on our website and is a valuable source of information on the doula benefit as its popularity increases across the U.S.

Overall, I was impressed with Hayfa's responsiveness to constructive feedback and her curiosity and willingness to take on a diverse portfolio of projects with high levels of complexity. She was always a team player and willing to help our team with longer term projects and time sensitive ones, while being able to shift her work load to meet the deadlines in a timely manner. Hayfa also demonstrated a strong work ethic, which was evident through my communications and collaboration with her. Hayfa's strengths are her thorough and clear research and writing skills. She demonstrated her ability to carefully analyze new legal issues, particularly the applicability of the California Shield Law to health care investigations. Her confidence and ability to produce thorough and well-researched work product would make her a valuable addition to your department.

Thank you for your consideration. Should you have any questions, please do not hesitate to contact me at rosellini@healthlaw.org.

Sincerely,

Skyler Rosellini,
Senior Attorney


NATIONAL
HEALTH
LAW
PROGRAM

June 17, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing on behalf of Hayfa Ayoubi and recommending her for the clerkship position in your chambers. I worked with Hayfa as her first-year Legal Research, Reasoning, Writing, and Advocacy (RRWA) professor. I know her to be hardworking and eager for a chance to demonstrate her intellect and passion for the law. As noted below, Hayfa would be an asset to your chambers for multiple reasons.

First, Hayfa is a quick study. For a year, she worked hard to master structure, clarity, and depth in her writing. She worked independently and demonstrated initiative. At the same time, she welcomed feedback, and she always incorporated my instruction when necessary.

Moreover, even as a 1L course, RRWA involves relatively intense research instruction, and Hayfa was able to set herself apart in this regard as well. She demonstrated proficiency in researching state and federal statutes, regulations, cases, and secondary sources. Equally as important, she was able to apply the law she located. Hayfa's research skills are further evidenced by her submission materials. Even as a busy law student, she has prioritized time to research and write important journal and blog pieces.

Second, Hayfa is generous with her talent and spirit. In RRWA, the students learn in groups through various interactive exercises and activities. Proficiency levels can vary, so a student's interpersonal skills are often tested just as frequently as their analytical skills. Hayfa was an honest yet empathetic peer. She provided thorough yet fair feedback and never judged others or isolated herself.

Further, Hayfa is a pleasure to collaborate with. I know that a judge's chambers is an intimate work environment, and I believe that Hayfa will fit in well. In the time that I taught her, we met for an individual conference at least four times. Every time, she showed up prepared, pleasant, and ready to actively listen and learn. I know that your team would find her to be a wonderful colleague.

Overall, I am confident that Hayfa would not take this opportunity for granted. If you have any further questions, you can reach me at scardull@email.unc.edu or 985-320-7797. Thank you for your time.

Sincerely,

Annie Scardulla

United States District Court for the District of Arizona Tucson Division

Trilátero Tex-Mex, LLC, Plaintiff, -v- Hector's Restaurants, LLC, Defendant	Civil Action 21-1986 Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 56

Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment

The triangle-shaped tortillas are not protectable by the Lanham Act, because they're functional as a matter of law. The shape of the tortilla enhances its taste and allows for bonus filling after the meal, the advertising promotes the functionality of the triangle-shaped tortillas, and the design has a comparatively simple and inexpensive method of production. Accordingly, the defendant respectfully requests that the court enter judgment in its favor.

Statement of Facts

I. Plaintiff, Trilátero Tex-Mex, LLC, owns and operates 21 restaurants.

Plaintiff opened its first restaurant in 2007 and currently operates a chain of restaurants throughout California, Arizona, and Nevada, doing business under the name Trilátero Tex-Mex. Compl. ¶¶ 5, 6. The restaurant serves a menu of Mexican and Tex-Mex cuisine, including staples such as tacos, burritos, fajitas, enchiladas, quesadillas, and tortas, and has offered certain tortilla wraps in the shape of triangles. Compl. ¶ 8.

II. From the opening of its first restaurant, Plaintiff has consistently marketed its triangle-shaped tortillas in many different ways.

This includes the name of Plaintiff's restaurant—Trilátero—which translates "three-sided" and was chosen to associate the restaurant with triangle shapes. Compl. ¶ 11(a); Def.'s Mot. Summ. J. Ex. A, 19:25-26. It also includes the Plaintiff's logo, used prominently in signage, on menus, and on its website, which features a picture of a dinosaur holding a taco wrapped in a triangle-shaped tortilla. Compl. ¶ 11(b). In addition, Plaintiff has used many slogans that tout the advantages of triangle-shaped tortillas. These slogans include: "It Tastes Better on a Triangle"; "Taste the Triangle!"; and "Caution: Sharp Corners Ahead." 12. *Id.* ¶ 11(d).

III. Plaintiff makes its triangle-shaped tortillas with the same method and ingredients as its the typical round tortillas.

Plaintiff makes its triangle-shaped tortillas using the same ingredients and virtually the same method as standard round tortillas: the tortilla mixture is pressed down with an industrial tortilla press. *Id.* ¶¶ 15, 16. The only difference is that, after the tortillas are pressed into circles, an employee cuts them into triangles. *Id*. The employee then adds the cut off parts to the next batch of dough on the front end and runs it back through the machine. Ex. A, at 13:12-13. Making triangle tortillas doesn't cost any more than making round ones. *Id.* at 13:14.

IV. Taste is important in determining the shape of the tortilla.

Plaintiff testified that a square-shaped tortilla would not be workable due to the incorrect filling to tortilla ratio, whereas the triangle-shape has a similar ratio as the typical round tortilla. *Id. at* 17:13-14.

V. Many customers enjoy the triangle tortillas.

Internet reviews of Plaintiff's restaurants regularly refer to the triangle-shaped tortillas. Compl. ¶ 14. Ten percent of the customer reviews mentioned liking the ratio of filling to tortilla and that the triangle shape made some of the filling fall out. Ex. A, at 19:19-20.

VI. Defendant owns and operates four different restaurants in Arizona, including one restaurant which serves triangle tortillas.

Defendant, Hector's Restaurants, LLC, opened its first restaurant in Tempe, Arizona in 2015 and currently has four restaurants across Arizona. Compl. ¶ 18; Ex. A, at 10:5. Defendant began serving some of its menu items on triangle-shaped tortillas in its Phoenix restaurant in 2018 and has since begun to serve some menu items on triangle-shaped tortillas in many of its restaurants. Compl. ¶ 20. For at least two years, Defendant has marketed its restaurants' use of triangle shaped tortillas in many ways, including that Defendant's advertising included the slogan "We Don't Cut Corners." *Id.* ¶ 21.

VII. Claiming that its triangle-shaped tortillas constitute trade dress, plaintiff filed a complaint pursuant to the Lanham Act, 15 U.S.C.A. § 1125, alleging that defendant infringed on its trade dress.

Argument

I. Defendant should be granted the motion for summary judgment under Rule (56).

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

a. There is no genuine dispute as to any material fact.

From the start of this litigation, there has been no dispute over the facts of the case. Plaintiff, Trilátero Tex-Mex, LLC, and defendant, Hector's Restaurants, LLC. agree that in 2017, defendant, who owns and operates four restaurants in Arizona, started serving its own version of triangle-shaped. Compl. ¶ 18, 20; Answer 18, 20. Parties further agree that plaintiff, which owns and operates twenty-one restaurants throughout California, Nevada, and Arizona and has been in business since 2007, serves some of the food items on triangle-shaped tortillas. Compl. ¶ 5-7, 9; Def.'s Mot. Summ. J. Ex. B, 14:14, 28. Evidently, there is no genuine dispute as to any material fact.

b. Defendant is entitled to judgment as a matter of law, because the triangle-shaped tortilla is functional and is therefore not protected as a trade dress under the Lanham Act.

To prove that a competitor infringed trade dress under section 43(a) of the Lanham Act, the owner of the claimed trade dress must prove three elements: (1) the product's design is nonfunctional, (2) the design is distinctive, and (3) the public will likely confuse the two products. *Disc Golf Ass'n, Inc. v. Champion Discs, Inc*., 158 F.3d 1002, 1005 (9th Cir. 1998).

In general, trade dress includes the overall look of a product and its packaging, including the design and shape of the product itself. *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 28 (2001). A product feature is functional and cannot serve as a trademark if it is essential to the use or purpose of the article or if it affects the cost or quality of the article. *Id.* at 34.

To determine whether a product feature is functional, the court should consider these three factors: (1) whether the design yields a utilitarian advantage, (2) advertising touts the

utilitarian advantages of the design, and (3) whether the particular design results from a comparatively simple or inexpensive method of manufacture. *Disc Golf* , 158 F.3d at 1006.

First, we will analyze how the design and shape of the triangle-shape tortilla makes utilitarian advantages. Then, we will discuss how the plaintiff's advertising promoted the functional advantages of the product. Finally, we will show how the design has a comparatively simple and inexpensive method of production.

1. **The triangle-shape of the tortilla improves the taste of food and enhances the eating experience by allowing some of the filling to fall out.**

   The issue is not whether a product is functional, but whether this particular shape and form of product which is claimed as trade dress is functional. *Disc Golf Ass'n, Inc.*, 158 F.3d at 1008. The product feature does not have to provide multiple utilitarian advantages and one utilitarian advantage is sufficient. *Id.* at 1007.

   The Ninth Circuit has not yet analyzed whether the effect of the product's shape on its taste is considered functional, but the Eleventh circuit held that a design or shape that contributes to the taste and consistency of a product is deemed essential to the product's purposes and affects its quality. *See Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC*, 369 F.3d 1197, 1206 (11th Cir. 2004). Furthermore, the customer's perception of the product due to its shape and design speaks to the functionality of the product. *See id*. In *Dippin' Dot*s., the court found that the spherical shape of dippin' dots allows for the quick and even freeze which is important to the taste and consistency of the product, making a product functional. *Id.* The court also relied on the fact that 20% of customers believed that the spherical shape of the ice cream

enhanced the ice cream's flavor as a factor in assessing the utilitarian advantage of the product. *Id.*

In *Blumenthal*, the court ruled that Eames chairs' design yields no utilitarian advantage because the designers were focused on finding the exact right look of the chair and were mostly concerned with the visual or aesthetic impact of the product. *Blumenthal Distributing, Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 863 (9th Cir. 2020).

Here, the triangle shape of the tortilla provides not only one but two utilitarian advantages. Similar to how the spherical shape of the ice cream enhances the taste and consistency of the product in *Dippin' Dots*, the triangle shape creates a desirable filling to tortilla ratio and enhances the eating experience by allowing some of the filling to fall out. Ex. A, at 19:19-20. The shape of the tortilla allows for the proper distribution of the filling, which evidently affects the ratio of tortilla and filling, making it important for the taste of the product. Similar to how the opinion of a minority of the customers was considered a factor in weighing the functional advantage of the product, 10 percent of the Trilátero's customers mentioned liking the ratio of filling to tortilla in triangle-shaped tortilla and enjoyed the falling out of the filling and that further proves the functional advantage of the triangle tortilla. *Id.*

In comparison to *Blumenthal's* Eames chairs' design which was based on aesthetic concerns, Trilátero was mainly concerned with the filling and tortilla ratio in determining the shape of the tortilla and less concerned with creating a product that is unique. Trialtero testified that a square-shape would not be workable presumably due

to the incorrect filling to tortilla ratio, whereas the triangle-shape has a similar, if not more desirable, ratio as the typical round tortilla. *Id.* at 17:13-14, 19:19-20.

Therefore, the triangle shape of the tortilla improves the taste of food and enhances the eating experience by allowing some of the filling to fall out.

2. Advertising of the product promoted the utilitarian advantages of the design.

If a seller advertises the utilitarian advantages of a particular feature, this constitutes strong evidence of functionality. *Disc Golf Ass'n, Inc.,* 158 F.3d at 1008.

The advantages of a specific design feature need not be touted explicitly, but may be implied from the advertisement as a whole. *Id.* In *Disc* Golf, the court found that while the plaintiff's advertising of its parabolic disc gold never mentions the term "parabolic," the inference of functionality is implicit in the advertising. *Id.* The phrasing used in the advertisement, coupled with a picture of a flying disc falling into a basket after hitting the parabolic chain, is enough evidence that its advertising promotes the functionality of the parabolic chain. *See Id.*

Advertising that touts functional features but includes messages aimed at nonfunctional features is, nonetheless, considered to promote the functionality of the product. *See Talking Rain Beverage Co. Inc. v. S. Beach Beverage Co.*, 349 F.3d 601, 604 (9th Cir. 2003). In *Talking Rain,* the plaintiff's use of "get a grip" as its slogan for the grip bottle promotes the functionality of the recessed area of the bottle which can provide a secure grip of the bottle. *Id.* at 603-04. While the plaintiff argued that its slogan has another meaning because it's a slang expression, the court reasoned that it's sufficient that the slogan promoted the functionality regardless of other potential interpretations. *Id.*

In the present case, the plaintiff's main slogan is "It tastes better in a triangle". Compl. ¶ 11(d). One of the utilitarian advantages of a triangle-shaped tortilla is the enhanced taste associated it with the tortilla to filling ratio. The language of the slogan clearly links the better taste to the triangle shape and alludes to a more enjoyable eating experience that results from the triangle shape of the product.

Similar to how the advertising in *Disc Golf* did not explicitly address the parabolic chain feature but was considered to promote the functionality of the feature when coupled with a picture that promotes the utility of the feature, advertising that doesn't explicitly promote the enhanced taste of the triangle-shape tortilla could be considered to promote that utilitarian feature when coupled with the name and logo of the restaurant. In some instances, the plaintiff uses certain phrases in advertising, such as "Mmm, Pointy" and "Taste the triangle". *Id*. The plaintiff crafted a name for the restaurant, Trilátero which means three-sided, in order to associate the restaurant with triangle shapes. Ex. A, at 19:25-26. In addition, the restaurant logo is a picture of a T. Rex holding a triangle-shaped taco. Compl. ¶ 11(b). On the face of it, phrases like and "Mmm, Pointy" and "taste the triangle" do not necessarily promote the enhanced taste associated with the triangle-shaped tortilla. However, when coupled with the name of the restaurant which references the triangle-shape as well as the logo with a triangle-shaped taco, it could be inferred that these phrases indeed advertise for the enhanced taste associated with the triangle shape of the product.

Similar to how the slogan "get a grip" in *Talking Rain* was deemed to be touting the functional feature of the grip bottle despite it being a slang expression with non-utilitarian interpretations, advertising that uses slang expressions yet promotes the

enhanced taste of the triangle-shaped tortilla is sufficient. On some occasions, plaintiff uses phrases in advertising, such as "Caution: Sharp Corners Ahead" and "Don't Be a Square". *Id.* ¶ 11(d). The defendant uses the slogan "We Don't Cut Corners." *Id.* ¶ 21. While these may be used as warning expressions or metaphors, they also clearly reference and imply the importance of the shape of tortilla. Moreover, when these expressions are interpreted in the context of a restaurant that has a name and a logo that promote the triangle-shaped tortillas, it could be inferred that these phrases indeed advertise for the utilitarian feature of the product.

Therefore, the advertising of the triangle-shaped tortilla promotes the utilitarian advantages of the product.

3- The design has a comparatively simple and inexpensive method of production.

A functional benefit may arise if the design achieves economies in manufacture or use. *Disc Golf Ass'n, Inc.,* 158 F.3d at 1008. A design achieves economies in manufacture or use when it is relatively simple or inexpensive to manufacture. *Id.*

In *Talking Rain*, the court found that because the grip feature reflects a comparatively simple method of manufacturing a structurally sound bottle that would not collapse, the trademarked bottle is functional. *Talking Rain Beverage Co. Inc.*, 349 F.3d at 604.

In *Blumenthal*, the trapezoidal frame and the one-piece seat and back of the Eames chair required at least some specialized technical equipment to manufacture, and therefore does not suggest a simple or inexpensive method of manufacture. *Blumenthal Distributing, Inc.*, 963 F.3d at 864.

The Ninth Circuit has not yet analyzed how the cost of the ingredients for making a product is assessed under functionality, but the Seventh Circuit held that products that utilize more expensive materials when compared to similar products do not achieve economies in manufacture. *Bodum USA, Inc. v. A Top New Casting Inc.*, 927 F.3d 486, 494 (7th Cir. 2019). In Bodum, the court ruled that that the Chambord French coffeemaker confers no cost or quality advantage that made it functional. *Id.* Of the many French presses that Bodum produced, the production of the Chambord is more expensive to produce than its counterparts with plastic frames, because its frame is made out of the more-expensive metal materials. *Id.*

Similar to how the production of grip feature provided the advantage of a non-collapsing bottle thereby making the manufacturing process efficient, the production of triangle tortilla made it possible to make a more desired tortilla while reusing the left over dough thereby making the manufacturing process efficient. Instead of losing dough, the employee adds the cut off parts to the next batch of dough and runs it back through the machine. Ex. A, at 13:12-13. It can be clearly established that the production of triangle tortillas made the manufacturing process efficient by saving and reusing dough.

In comparison to the Eames chair in *Blumenthal,* making triangle-shape tortillas does not require any specialized technical equipment to make. Instead, triangle tortillas are made using the same automatic tortilla-maker that rolls and presses the typical round tortillas, and are then cut to make it triangle. Compl. ¶ 16. Evidently, the triangle tortillas do not require any specialized technical equipment to make.

In comparison to the Chambord French press, Trilátero's triangle-shaped tortillas have the exact same ingredients as the typical round tortillas. Plaintiff makes its triangle-shaped tortillas with the same ingredients as standard round tortillas. Compl. ¶ 15. Making triangle tortillas doesn't cost any more than making round ones. Ex. A, at 13:14. It is clear that there no additional costs arising from the ingredients of the triangle tortilla.

Therefore, the design has a comparatively simple and inexpensive method of production.

Defendant is entitled to judgment as a matter of law, because the triangle-shaped tortilla is functional and is therefore not protected as a trade dress under the Lanham Act.

Conclusion

For the foregoing reasons, defendant Hector's Restaurants, LLC respectfully requests that this court enter judgment in its favor.

Applicant Details

First Name	**Marina**
Last Name	**Barron**
Citizenship Status	**U. S. Citizen**
Email Address	**marina.barron@brooklaw.edu**
Address	**Address** **Street** **207 E 88th #4A** **City** **New york** **State/Territory** **New York** **Zip** **10128** **Country** **United States**
Contact Phone Number	**6463519486**

Applicant Education

BA/BS From	**Trinity University**
Date of BA/BS	**May 2020**
JD/LLB From	**Brooklyn Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23302&yr=2009**
Date of JD/LLB	**May 15, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Brooklyn Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Gold, Andrew
andrew.gold@brooklaw.edu
Gora, Joel
joel.gora@brooklaw.edu
718-780-7926

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MARINA BARRON
207 E. 88th Street
New York, NY 10128
marina.barron@brooklaw.edu

June 12, 2023

Honorable Juan R. Sánchez, Chief Judge
United States District Court, Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

Dear Judge Sánchez,

I am a rising third-year at Brooklyn Law School and I am applying for a clerkship in your chambers for the 2024-2025 term. I finished my second year of law school fourth in my class (4/402) with a 4.068 GPA. I am an Executive Articles Editor of the *Brooklyn Law Review* and a member of the Alternative Dispute Resolution Honor Society.

While interning for the Honorable Lorna G. Schofield in the Southern District of New York last summer, I became deeply inspired to pursue a federal clerkship. I thoroughly enjoyed being fully immersed in the intellectually stimulating process of legal research, memo drafting, and editing. I am currently working as a Summer Associate at Davis Polk & Wardwell where I have worked closely with attorneys on various civil litigation matters, further refining and strengthening my legal research and writing abilities. Additionally, my work with the trial teams at the United States Securities and Exchange Commission and the United States Federal Trade Commission solidified my passion for and interest in pursuing a career in litigation.

I believe my strong writing skills, as well as my academic and professional achievements, will make me an excellent addition to your chambers. I have continued my passion for writing while working on my note, *Identity Crisis: First Amendment Implications of State ID Card and Driver's License Branding for Registered Sex Offenders,* which is to be published in the *Brooklyn Law Review* this Fall.

In support of my application, I have enclosed my resume, transcript, and writing sample. Professors Joel Gora and Andrew Gold of Brooklyn Law School have provided letters of recommendation on my behalf. Thank you for considering me as an applicant and I hope to have the opportunity to interview with you and discuss the position further.

Sincerely,

Marina Barron

MARINA BARRON
marina.barron@brooklaw.edu - 646.351.9486

EDUCATION

Brooklyn Law School, Brooklyn, NY
Juris Doctor Candidate, May 2024
GPA: 4.068
Rank: 4/402
Honors: Dean's List 2021-22; *Brooklyn Law Review*, *Executive Articles Editor*; Alternative Dispute Resolution Honor Society
Awards: Prince Scholarship Recipient; John J. Meehan Scholarship Recipient; Block Judicial Intern Fellow; CALI Excellence for the Future Award: *Torts, Legal Research and Writing, Constitutional Law, Property, Contracts, Trusts and Estates*
Activities: Phi Delta Phi Legal Honor Society; 2023 Miami Sneaker Law Negotiation Competition, *First Place*

Trinity University, San Antonio, TX
Bachelor of Arts, Double Major in Urban Studies and French; Minor in Economics, May 2020
Senior Thesis: "Place-Based Tax Incentives for San Antonio's East Side and Confluence Park"

PUBLICATIONS

Marina D. Barron, *Identity Crisis: First Amendment Implications of State Identification Card and Driver's License Branding for Registered Sex Offenders*, BROOK. L. REV. (forthcoming 2023).

EXPERIENCE

Davis Polk & Wardwell LLP., New York, NY — May 2023 – Present
Summer Associate
Worked closely with partners and associates in various practice groups across the firm. Conducted extensive legal research and drafted memos for civil litigation matters on evidentiary issues, attorney-client privilege, and contract disputes.

Professor Joel Gora, Brooklyn Law School, Brooklyn, NY — August 2022 – Present
Constitutional Law and First Amendment Law Research Assistant
Provided Professor Gora with legal research on a wide range of constitutional law issues and conducted in-depth analyses of recent Supreme Court cases. Assisted in the preparation for his Constitutional and First Amendment Law classes.

United States Federal Trade Commission, New York, NY — January 2023 – April 2023
Legal Intern
Worked directly with attorneys in the Bureau of Consumer Protection on various consumer protection matters. Assisted in the legal research and drafting of motions in limine for an upcoming trial. Made numerous calls to consumers, investigated their claims, and drafted consumer declarations to be referenced and used by attorneys throughout the investigation process.

United States Securities and Exchange Commission, New York, NY — September 2022 – November 2022
Legal Scholars Extern
Assisted attorneys on a variety of securities matters by conducting document review, legal research, and assisting in the drafting of various court motions. Read and annotated voluminous court documents and transcripts to be used by attorneys in summary judgement motions. Conducted investigative research and compiled key statements for investigations and motions.

Honorable Lorna G. Schofield, United States District Court, S.D.N.Y — May 2022 – August 2022
Judicial Intern
Performed legal research and analysis related to a variety of civil and criminal matters including complex class action lawsuits and writs of habeus corpus. Assisted in the drafting of legal memoranda and the cite-check of opinions. Attended various court proceedings including conferences, sentencing hearings, motions arguments, and a trial.

Kennedy Sutherland LLP, San Antonio, TX
Executive Legal Assistant — June 2020 – August 2021
Managed projects related to community bank legal representation, Historic Tax Credit transactions, and Opportunity Zone formations. Supported clients with entity formation, mortgage loan closings, and the review of legal documents.

LANGUAGE SKILLS AND INTERESTS

Proficient in French. Interests include crocheting, playing guitar, and cooking.

MARINA BARRON
,

Special Note: Document number: 68778599-1

Student Name: Marina D Barron
Student ID..: 0426087 Class: 2F

	Courses	Cred Att	Grd	Grad Crs	GPA Calc	Faculty
	Fall 2021					
CRM 100 D3S	Criminal Law	4.00	A	4.00	16.00	A. Kolber
LWR 100 D19	Legal Research & Writing	3.00	A	3.00	12.00	M. Holzer
TRT 100 D2	Torts	4.00	A+	4.00	17.32	A. Gold
CPL 102 D2	Civil Procedure	4.00	A-	4.00	14.68	J. Ressler
Sem GPA 4.000	Cum GPA 4.000	15.00		15.00	60.00	
	Spring 2022					
CLT 100 D4	Constitutional Law	4.00	A+	4.00	17.32	J. Gora
CTL 100 D4	Contracts	4.00	A+	4.00	17.32	W. Taylor
PTE 100 D4	Property	4.00	A+	4.00	17.32	B. Lee
LWR 101.2 D6	Gateway: Law & Individual Lif	4.00	A	4.00	16.00	M. Holzer
Sem GPA 4.248	Cum GPA 4.128	16.00		16.00	67.96	
	Fall 2022					
CLN 200 D1	Civil Practice Ext Fieldwork	3.00	HP SK	3.00	0.00	J. Balsam
CRM 200 E1	Crim. Pro.: Investigations	3.00	A	3.00	12.00	S. Herman
PTE 201 D1	Trusts & Estates	3.00	A+	3.00	12.99	S. Winsberg
CLN 201.8 E1	Civ Ext Sem - Sec & Mkt Reg	1.00	A	1.00	4.00	B. Hochhauser
LWR 320 D1	Brooklyn Law Review	2.00	P #	2.00	0.00	B. Jones-Woodin
Sem GPA 4.141	Cum GPA 4.130	12.00		12.00	28.99	
	Winter 2023					
BOL 205 D1	Business Boot Camp	1.00	P	1.00	0.00	M. Gerber
Sem GPA 0.000	Cum GPA 4.130	1.00		1.00	0.00	

NEXT PAGE...

Credits Attempted: 59 Credits Completed: 59 Credits toward GPA: 48 GPA Grade Points: 195.27 GPA: 4.068
Comments: # indicates successfully completed AWR. SK indicates successfully completed Skills Requirement. Dean's List 2021 - 2022 END OF COMMENTS

Julie Brown
Brooklyn Law School Registrar

MARINA BARRON
,

Special Note: Document number: 68778599-1

Student Name: Marina D Barron
Student ID..: 0426087 Class: 2F

			Courses	Cred Att	Grd	Grad Crs	GPA Calc	Faculty
			Spring 2023					
LGE	120	D3	Prof Responsibility - Distanc	2.00	A	2.00	8.00	M. Colatrella
CLN	200	D1	Civil Practice Ext Fieldwork	3.00	HP SK	3.00	0.00	J. Balsam
BOL	200	D1	Corporations	4.00	A+	4.00	17.32	A. Gold
CLN	201.10	E1	Civ Ext Sem - Govt Counsel	1.00	A	1.00	4.00	L. Polishook
LWR	320	D1	Brooklyn Law Review	1.00	P	1.00	0.00	B. Jones-Woodin
BOL	321	D1	Securities Regulation	3.00	B	3.00	9.00	A. Jennings
LWR	415	D1	ADR Competitions	1.00	P	1.00	0.00	S. Caplow
Sem GPA 3.832			Cum GPA 4.068	15.00		15.00	38.32	

END OF THIS TRANSCRIPT

Credits Attempted: 59 Credits Completed: 59 Credits toward GPA: 48 GPA Grade Points: 195.27 GPA: 4.068
Comments: # indicates successfully completed AWR. SK indicates successfully completed Skills Requirement. Dean's List 2021 - 2022 END OF COMMENTS

Julie Brown
Brooklyn Law School Registrar

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to provide my highest recommendation of Marina Barron for a clerkship with your court. She is one of the most impressive, articulate, and enthusiastic students that I have taught during my time on the faculty at Brooklyn Law School. She also received the CALI award in my Torts class (out of a very large class), and she has generally exceled at Brooklyn. I believe she is particularly well-suited to be an outstanding law clerk.

Marina's legal interests are also broad, ranging from securities law to constitutional and First Amendment law. As a former intern with Judge Lorna Schofield on the Southern District of New York, she has a demonstrated interest in a clerkship and an understanding of what that role entails. As an intern at both the SEC and the FTC, she has pursued a particular interest in litigation. I can also say, based not only on her performance on my Torts essay exam, but also based on a review of her student note for the Brooklyn Law Review, that she is an exemplary writer.

Again, I give my highest recommendation of Marina Barron for this clerkship. She is an unusually strong student who will have an impressive legal career, and I am very confident that she will be an excellent law clerk. If I can help with any further questions, please do not hesitate to contact me at andrew.gold@brooklaw.edu, or at (312) 498-4997.

Sincerely,

Andrew Gold
Professor, Brooklyn Law School

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to offer my strongest support for the clerkship application of Marina Barron, a third-year student at Brooklyn Law School. Ms. Barron is one of the most exceptional students I have encountered in my 45-year-long career of law teaching. Indeed, I was recently thinking about the top students I have ever taught, those whose intelligence, judgment and character seemed to make them destined to have exemplary careers in private practice or public service. Ms. Barron would clearly be on that superstar list. So, I am particularly glad to have the opportunity to submit this letter of recommendation on her behalf.

Ms. Barron has had an extraordinary career at the law school thus far. She ranks number 3 in her class with a remarkable 4.13 grade average and has received numerous prizes for being the best student in many of her classes. She holds a top editorial position on the Brooklyn Law Review and has also been very active in our interscholastic moot court activities. I am convinced that her abilities, accomplishments, and character make her a serious clerkship candidate.

I first came to know Ms. Barron when she was a student in my IL Constitutional Law class. I soon noticed how well and thoughtfully she responded to classroom questioning and discussion, showing a powerful understanding of the issues being considered. I was particularly taken by the questions she would raise with me at the podium during class breaks. They invariably reflected a firm grasp on the basic doctrines and principles under discussion. But, more notably, they reflected a powerful and unusual insight into the second generation of issues, those not resolved by the cases we were studying, issues that would have to be addressed by the Court in the future. She had an uncanny knack of putting her finger precisely on such questions, reflecting a distinctive capacity for legal analysis and seeing the future implications for legal doctrine.

My strong sense of Ms. Barron's abilities was vindicated when she turned in a superb exam paper and got the top grade of A+ in the Constitutional Law course, as she has in so many other of her classes. As soon as the grades were finalized, I asked if she would be interested in serving as my Research Assistant. Happily, she agreed, and we have worked closely together, to my great benefit, for the last year or more and will continue to do so during her 3L year.

Having Ms. Barron serve as my Research Assistant has given me an even better perspective on her exceptional talents and abilities. She has done research for me on a wide variety of Constitutional Law issues for my class lectures and my outside scholarship. Her writing is excellent - clear, precise, responsive - and her research skills are a match. She also provided invaluable assistance to my preparing a set of Multiple Choice Questions for both my Constitutional Law and First Amendment Law courses. There, too, she provided excellent assistance: drafting a majority of the questions, providing explanations for the correct answers and also handling all of the technical tasks of posting the questions on course pages for student access and response. I am quite sure I would not have been able to discharge those MCQ responsibilities without her essential assistance.

As one might expect from such an exceptional student, Ms. Barron is an excellent writer. She has written a most impressive law review note to be published in our Law Review dealing with the constitutional validity of compelling state identification card and driver's license branding for registered sex offenders. These requirements were mandated by the Congressional enactment in 2006 of the Sex Offenders Registration and Notification Act (SORNA), creating a national registration system for individuals convicted of sex offenses. As Ms. Barron notes, the resulting federal and state registration requirements have been criticized for being excessively punitive in nature and not necessarily effective as a tool of sex crime prevention. In her view, the registries allow for ostracization of registrants and often prevent offenders from becoming functioning members of society after incarceration. Ms. Barron builds her case carefully both by doctrinal reference to constitutional requirements and pragmatic assessments of how the law operates in practice. She persuasively concludes that the Act's ID requirements constitute compelled speech that cannot meet strict scrutiny standards, violate the constitutional rights of those individuals subjected to those requirements and do more harm than good for rehabilitation. The article is meticulously researched, beautifully written and highly persuasive. It reads like a compelling brief or a persuasive judicial opinion.

In addition to possessing these extraordinary abilities and skills, and in the process of acquiring and honing them, Ms. Barron has had some very valuable clinical and job experiences. She is currently a Summer Associate at Davis, Polk & Wardwell, one of the nation's premier law firms. She has interned with the Federal Trade Commission's legal department working on their consumer protection cases, as well as with the Securities and Exchange Commission assisting on some of its litigation matters. Most significantly she served in 2022 as a Judicial Intern to United States District Court Judge Lorna G. Schofield in the Southern District of New York. All these experiences have added significantly to the exceptional skills and abilities that she will bring to a clerkship. And they have given her a keener interest in litigation and the judicial process.

I am convinced that Marina Barron will have a remarkably successful career in the profession. She is already having one of the most extraordinary student careers I have ever seen, manifesting her powerful legal mind, her eminently sound judgment and her congenial personality. She is easygoing, but nevertheless mature, respectful, and diligent. She is a complete pleasure to teach and mentor, and she will be a valuable member of your judicial team. Indeed, I often imagine our professor/student interaction has been very much like a beneficial and fruitful partner/associate relationship at a law firm or a judge/law clerk relationship in chambers. In that regard, I strongly believe her talents and character traits will guarantee that she would do an excellent job in

Joel Gora - joel.gora@brooklaw.edu - 718-780-7926

assisting the work of any judicial chamber. I very much hope that she will have the opportunity to do so.

If I can provide any further information, please do not hesitate to let me know.

Sincerely,

Joel M. Gora
Professor of Law

Joel Gora - joel.gora@brooklaw.edu - 718-780-7926

MARINA BARRON
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New York, NY 10128
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WRITING SAMPLE 1

The attached writing sample is an appellate brief I wrote for my Gateway to Lawyering: Legal Research and Writing Class during the Spring 2022 semester. This sample has been not been edited others.

QUESTION PRESENTED

Under the Fourth Amendment, did the District Court err in finding no unreasonable search when a school official received an anonymous tip and blurred photograph from a gossip website that someone possessed marijuana, assumed it was about one of the top students without investigating the accusation or any other reason to suspect that student, subsequently searched them and their backpack the next day in the hallway surrounded by other students, and continued the search even after finding no problematic evidence?

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On October 5, 2020, plaintiff Daniel Humphrey sued defendant Constance Jude High School ("Constance") in the United States District Court for the Southern District of New York for allegedly violating his Fourth Amendment protection from unreasonable searches. R-1. Constance answered the complaint on October 16, 2020. R-5. On March 7, 2021, Dan filed a motion for Summary Judgment, asserting no genuine issue of material fact as to his claim. R-26. On March 14, 2021, Constance filed a Cross-Motion for Summary Judgment, which the District Court granted on January 18, 2022. R-27, 29. On January 24, 2022, Dan appealed this decision. R-30.

STATEMENT OF FACTS

Dan was a hardworking, dedicated student at Constance; he was second in his class and teachers loved him. R-7, 21. As the only male student from Brooklyn, he "felt like an outsider," but always tried "to be a good person" and avoided obtaining a "bad boy reputation." R-8, 11.

Gossip Girl was a "gossip website" that sent "blasts" to subscribers, including Constance students and Constance's Vice Principal, Mary-Ann Queller. R-2, 19. Most blasts, which Queller called "salacious gossip" and "nothing intellectual," were about students' "love lives" and "changes in school policy." R-19, 24. One student said blasts were "pretty darn accurate" and Queller said those regarding policy were true. *Id*. However, Queller could not confirm the accuracy of blasts generally. R-19.

On September 9, 2020, Gossip Girl sent a message insinuating that "Lonely Boy," Gossip Girl's nickname for Dan, and Serena van der Woodson were dating, along with a picture

of them "looking cozy." R-12, 15, 20. Dan confirmed they were dating when the picture was taken, and Queller called this blast "stupid." R-9, 20. On September 17, 2020, Gossip Girl sent another blast with the message: "a certain Brooklynite at Constance Jude High in possession of weed," accompanied by a blurred photograph of an unidentified man's face. R-12.

Queller believed the second blast was about Dan, despite being unable to "tell from the picture" because it was blurred. R-21. She was "completely shocked" when she thought it was him, but was "convinced" because Dan was from Brooklyn and dated Serena, whose brother Eric went to rehab a year prior to the blast. *Id*. Despite Dan's "spotless record," Queller claimed kids are "easily influenced by their peers." R-10, 21.

A day later, Dan was "minding [his] own business" when Queller approached him in the "hallway at lunchtime" and without telling him why, asked him to "empty his pockets," to which he complied. R-9, 10, 15. She then asked him to "empty [his] backpack" and after nothing problematic was found in either, she checked the bag's pockets and then "shook it upside down." R-10. Queller "made a complete mess" of Dan's things, including paintings he "hadn't shared with anyone," and then handed him the bag and muttered that he was "lucky this time." R-10, 15.

Twenty-five students "formed a ring" around Dan and took pictures as he was searched. R-10, 17. Queller did not think to conduct the search privately because she "wasn't really thinking about anything else" than finding Dan. R-22. Some students congratulated him for getting in trouble and one called his paintings "lame." R-16. Dan felt "embarrassed" and found the search absolutely "mortifying." R-11.

STANDARD OF REVIEW

This Court reviews the District Court's "grant of summary judgment *de novo*, drawing all factual inferences in favor of the non-moving party." *Phaneuf v. Fraiken*, 448 F.3d 591, 595 (2d Cir. 2006).

ARGUMENT

I. THE DISTRICT COURT INPROPERLY GRANTED CONSTANCE'S CROSS-MOTION FOR SUMMARY JUDGMENT BECAUSE QUELLER'S SEARCH OF DAN AND HIS BACKPACK WAS NEITHER JUSTIFIED AT ITS INCEPTION NOR REASONABLE IN SCOPE AND THEREFORE, WAS AN UNREASONABLE SEARCH IN VIOLATION OF THE FOURTH AMENDMENT.

The Fourth Amendment of the Constitution protects citizens against "unreasonable searches and seizures." U.S. Const. amend. IV. The Supreme Court held that this prohibition "applies to searches conducted by public school officials." *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985). In schools, a student search must be "'justified at its inception'" and "'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id*. at 341 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). Here, the search was not justified at its inception because Queller relied solely on an unspecific tip from Gossip Girl who had not previously provided reliable drug-related information, she failed to investigate the information in the tip, and she had no other reason to suspect Dan possessed drugs at school. Additionally, the search was unreasonable in scope because it advanced without the discovery of any drug-related evidence, took place publicly despite the low risks posed by the supposed marijuana possession, and humiliated Dan. Therefore, the search was unreasonable and thus, this Court should reverse the District Court's ruling granting Constance's Cross-Motion for Summary Judgement.

A. The search was not justified at its inception because Queller relied on an anonymous, vague tip from an informant not known to provide reliable drug-related information, she failed to corroborate the tip's accusation, and she had no independent basis for reasonably suspecting that Dan possessed marijuana.

A student search is considered justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student" is in violation of the law or school rules. *Id*. at 342. Where searches are prompted by a tip, courts should evaluate the tip "based on the 'totality of the circumstances,' while allowing for the 'lesser showing required'

to meet the reasonable suspicion standard." *Phaneuf v. Fraiken*, 448 F.3d 591, 597 (2d Cir. 2006) (citing *Alabama v. White*, 496 U.S. 325, 329 (1990)). Courts may consider "an informant's veracity, reliability, and basis of knowledge, as well as whether the information an informant has provided is corroborated by independent investigation." *Id*. Aside from tips, factors that may raise reasonable suspicion to conduct a student search include "a student's past history of drug use," the discovery of contraband, and "the manner in which a [student] acts when confronted." *Id*. at 599.

The Supreme Court held that a tip was unreliable when it provided no predictive information and was uncorroborated. In *J.L*, an anonymous caller reported that a man "wearing a plaid shirt" possessed a gun. *Florida v. J.L.*, 529 U.S. 266, 268 (2000). The Court held that the tip was unreliable because it contained nothing predicative, and therefore, "left the police without means to test the informant's knowledge or credibility." *Id*. at 271. Further, the Court noted that the informant's ability to accurately identify physical characteristics of the accused did not indicate "knowledge of concealed criminal activity." *Id*. at 272.

Conversely, the Supreme Court has held that tips may be reliable when they contain enough detail to allow for, and are followed by, sufficient corroboration of the tip's information. In *Gates*, police received an anonymous tip detailing the names and travel plans of the respondents. *Illinois v. Gates*, 462 U.S. 213, 225 (1983). The Court found that the tip was only reliable after investigation, reasoning that the tip alone gave "no indication of the basis for the [informant's] predications," but because the predications were corroborated, other statements in the tip could be relied on. *Id*. at 227. Similarly, in *White*, police received an anonymous tip that the respondent would leave "at a particular time" in possession of drugs. *White*, 496 U.S. at 327. The Court held that the tip was reliable because the informant's predictions of the respondent's

future movements were proven true through observation. *Id*. at 332. The Court reasoned that because the "public would have no way of knowing" the information predicted, the informant likely had "reliable information about [the respondent's] illegal activities." *Id*.; *see also Adams v. Williams*, 407 U.S. 143, 146 (1972) (holding that a known informant, which was "a stronger case" than an anonymous tip, provided "immediately verifiable" information and therefore, was reliable).

In schools, courts held that student searches were not justified when prompted by unreliable tips and without an independent basis for suspecting the student, and were justified when there was physical evidence of contraband. In *Phaneuf*, this Court held that neither a student tip alone, nor combined with circumstantial information, were enough to justify the search for marijuana. *Phaneuf*, 448 F.3d at 600. The Court reasoned that statements that the informant was a "'trustworthy' student'" were too "vague" and "conclusory" to confirm the tip's reliability without corroboration. *Id*. at 598. Further, the Court noted that past disciplinary problems are "not necessarily indicia of drug abuse," there was no evidence that the student acted suspiciously, and the found cigarettes had a "tenuous connection to the alleged marijuana." *Id*. at 599. Conversely, in *T.L.O*, the Supreme Court held that the search of a student's purse was justified after she was found smoking, reasoning that the smoking provided reasonable suspicion that she had cigarettes with her, "and if she had cigarettes, her purse was the obvious place" they would be. *T.L.O.*, 469 U.S. at 345-6.

Here, Gossip Girl had no history of supplying reliable information regarding the drug-related activities of students. Unlike the informant in *Adams*, who was known personally, Gossip Girl is purely anonymous and according to Queller, publishes "salacious gossip" that is "nothing intellectual." Queller had no reason to trust the September 17 blast, and even referred to

information in a previous blast as "stupid." She could not confirm Gossip Girl's reliability generally and while she said Gossip Girl was right about "changes in school policy," that is information the public could likely easily find and not insider information, unlike in *White* where the information was unknown to the public. Although a student said Gossip Girl was "pretty darn accurate," this is a vague statement, similar to those regarding the informant in *Phaneuf*, and cannot be considered proof of reliability on drug-related matters. The other blasts were about student relationships, and while Gossip Girl was right about Dan and Serena's relationship in the September 9 blast, that did not indicate Gossip Girl had any insight into other aspects of Dan's life. Gossip Girl's ability to analyze an obvious and revealing photograph of the couple "looking cozy" does not suggest she would have information regarding Dan's supposed drug possession, similar to *Gates* where there was no basis for the predications prior to investigation.

Further, the tip lacked enough detail to connect Dan to the accusation and Queller failed to conduct an independent investigation of its information. The blast was nothing more than a blurred picture accompanied by vague text and, like the tip in *J.L.* that only described present criminal activity, was a mere accusation that someone possessed marijuana and predicted no future behavior of the possessor or Dan. Unlike the tip in *Gates* that meticulously described the names and travel plans of the respondents, the blast provided no time, location, or even the possessor's name. Gossip Girl's vague description of the accused as "a certain Brooklynite" provided nothing to gauge her reliability, similar to *J.L.* where the identification of the accused's characteristics did not signal insider knowledge. Queller assumed the blast was about Dan and although he was the only male from Brooklyn, Gossip Girl never referred to Dan explicitly and did not even use her nickname for him, "Lonely Boy." Even a more detailed tip, like that in *White*, required corroboration prior to reliance, and here, Queller failed to independently

investigate the photograph or look into Gossip Girl's basis for the accusation. Unlike in *Adams* where information was verified immediately, nothing in the blast could be confirmed just by reading it, not even who was in the photograph or if the supposed marijuana was actually on campus, and therefore, a justifiable search required more action by Queller.

Additionally, Queller had no reason to suspect Dan possessed marijuana aside from her unreasonable assumptions from the unreliable tip. In fact, she said she was "completely shocked" when she thought he might be involved. Dan was a student least likely to violate school rules; he was second in his class and teachers loved him. The sole and tenuous connection Dan had to drugs was through Serena's brother who went to rehab a year prior, which is a much weaker connection to marijuana than the cigarettes in *Phaneuf*. Even there, prior infractions were not enough to justify the search and here, Dan had a "spotless record" and there is no sound basis for inferring that Eric, who is an entirely different person, and his prior drug use would negatively "influence" Dan enough to possess marijuana on September 18. Further, unlike in *T.L.O.* where the student was found smoking, Dan was never seen or reported with marijuana, nor did Queller ever see any drugs in the photograph or on campus. The accusation was pure rumor, not grounded in any evidence, physical or otherwise, to connect Dan with drugs a full day after it was posted, or at all. Finally, like in *Phaneuf* where the student's manner was unalarming, Dan was "minding [his] own business" when approached and complied with Queller's demands, giving her no reason to suspect him of drug-related activity. Aside from her conclusions made from the unreliable blast, Queller had no independent basis for suspecting Dan possessed marijuana and therefore, the search was not justified at its inception.

B. Even if the search was initially justified, it was unreasonable in scope because Queller continued to search even after finding no evidence, she conducted the search publicly despite the limited risks posed by marijuana, and the search humiliated Dan in front of his peers.

A student search is considered reasonable in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.*, 469 U.S. at 342. The search should "ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *Id*. at 343.

A student search was reasonable in scope when the discovery of some contraband led to the reasonable belief that continuing the search would reveal more. In *T.L.O*, the initially justified search revealed cigarettes and rolling papers. *Id*. at 347. The Court found that the rolling papers "gave rise to a reasonable suspicion that [the student] was carrying marijuana" which justified further search of the purse. *Id*. When the search revealed other drug-related activities, the Court found it reasonable to "extend the search" to other compartments of the purse. *Id*.

Conversely, a search was unreasonable in scope when the risks posed by the student's suspected activity did not warrant the invasiveness of the search. In *Safford*, the official told the student "he received a report that she was giving" out pills. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 368 (2009). The Supreme Court found the strip search of the student unreasonable, reasoning that there was no "danger to the students" from the pills and no reason to believe they were in her underwear. *Id*. at 376. Further, the student's "subjective expectation of privacy" against strip searches was clear "in her account of it as embarrassing, frightening, and humiliating." *Id*. at 374-5.

Here, the manner in which Queller conducted the search was inappropriate and unnecessary. Unlike in *T.L.O.* where the discovery of rolling papers prompted a more invasive

search for marijuana, nothing suspicious was found in Dan's pockets, yet Queller proceeded to ask him to empty his backpack. Even if the initial search of Dan's pockets or bag was justified, which it was not, it was completely unreasonable to continue to the pockets of the backpack and "[shake] it upside down" after nothing was found in Dan's pockets or seen in the unzipped bag. Additionally, like the harmless pills in *Safford*, the risk of marijuana at Constance did not warrant an immediate search of Dan in the hallway. The search could have easily taken place in private, yet because Queller "wasn't really thinking about anything else," she disregarded that while marijuana violated school policy, it did not pose any immediate danger.

Further, the search violated Dan's expectations of privacy by publicly humiliating him. The search took place in the "hallway at lunchtime" surrounded by twenty-five students and like the humiliated student in *Safford*, Dan felt "embarrassed" and said the search was "mortifying." Although it was not as invasive as the strip search in *Safford*, Dan was similarly put on display as his classmates took pictures and "formed a ring" around him, and Queller's disregard for her student's emotional wellbeing only exaggerated Dan's feelings as an "outsider." Dan tried "to be a good person," so while he was congratulated for getting in trouble, he did want attention for having a "bad-boy reputation." Unlike the official in *T.L.O.* who kept the student's property intact, Queller made "a complete mess" of Dan's things and revealed paintings he "hadn't shared with anyone" that a student later ridiculed. She abused her power as a school official by not telling Dan why he was being searched, unlike in *Safford* where the official explained his reasoning beforehand, and by telling Dan he was "lucky this time" after the search revealed nothing. Given the relatively low risks produced by marijuana compared to the inappropriate and humiliating manner in which the search was publicly conducted, the search was unreasonable in scope.

CONCLUSION

For the reasons above, this Court should reverse the District Court's decision granting the Defendant's Cross-Motion for Summary Judgment.

Applicant Details

First Name	**Nachiketa**
Last Name	**Baru**
Citizenship Status	**U. S. Citizen**
Email Address	**nab4bz@virginia.edu**
Address	**Address** **Street** **3525 Santoro Way** **City** **San Diego** **State/Territory** **California** **Zip** **92130**
Contact Phone Number	**(858) 947-8320**

Applicant Education

BA/BS From	**Pomona College**
Date of BA/BS	**May 2018**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 22, 2022**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Virginia Journal of International Law, Virginia Journal of Law and Technology**
Moot Court Experience	**Yes**
Moot Court Name(s)	**UVA Law Moot Court** **Lile Moot Court**

Bar Admission

Admission(s)	**California**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Ferzan, Kimberly
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 3, 2023

The Honorable Juan R. Sanchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

Dear Judge Sanchez:

I am a Class of 2022 graduate from the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers for a one-year term starting September 2024.

I am currently an associate at Cooley LLP in San Diego, specializing in complex business litigation at both trial and appellate level. I have a wide range of exposure to the litigation process and to legal research, in public service as well as in private practice. I believe my experiences have equipped me with the requisite knowledge, practical understanding, and written and oral presentation skills to be a competent clerk.

I am enclosing my resume, my law school transcript, and a writing sample. My writing sample is from a law school jurisprudence course and is substantially my own work, although I incorporated feedback from my professor. You should also be receiving letters of recommendation from Professors John Duffy, Kimberley Ferzan, and Juliet Hatchett.

Please reach out to me at the phone number or email above if I can offer further information. I appreciate your consideration.

Sincerely,

Nachiketa Baru

Nachiketa A. Baru

1605 Brandywine Dr., Charlottesville, VA 22901 • (858) 947-8320 • nbaru@cooley.com

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2022

- GPA: 3.57
- *Virginia Journal of International Law*, Productions Editor
- *Virginia Journal of Law and Technology*, Editorial Board
- Extramural Moot Court
- Peer Advisor
- Virginia Innocence Project
- University of Virginia Honor System Committee, Investigator/Counselor
- Law Democrats, Treasurer
- South Asian Law Students Association, Board Member

Pomona College, Claremont, CA
B.A., Neuroscience, May 2018

- The Student Life, Student Journalist
- 3W Club, Tutor (assisting ESL students with language fluency)

EXPERIENCE

Cooley LLP, San Diego, CA
Associate, November 2022 – Present; *Summer Associate*, Summer 2021

- Perform legal research and draft memos and pleadings in complex business, securities, and appellate civil litigation matters

Office of the Public Defender, San Diego, CA
Intern, Summer 2020

- Performed legal research, reviewed discovery materials, and drafted pleadings
- Drafted motions to dismiss complaints, to suppress and exclude evidence, and to initiate competency proceedings

Professor Kimberly Ferzan, University of Virginia Law School, Charlottesville, VA
Research Assistant, Summer 2020

- Researched case law and reviewed secondary literature on accomplice liability

Law Office of Paul J. Ryan, San Diego, CA
Clerk, March – August 2019

- Drafted pleadings, discovery requests and responses, and settlement agreements
- Prepared for hearings and trials, including managing exhibits and trial binders
- Communicated with clients regarding details of active matters

Jorge F. Gonzales, Esq., San Diego, CA
Legal Assistant, June 2018 – August 2019

- Drafted pleadings and discovery documents in civil and criminal matters
- Drafted questions and prepared exhibits for deposition and trial examinations

Legal Aid Society of San Diego, San Diego, CA
Volunteer, November 2017 – August 2019

- Helped counsel clients on civil matters at state courthouse walk-in clinics
- Drafted complaints, answers, petitions, and other pleadings
- Recognized for outstanding service by organization and California state bar

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Nachiketa Baru

Date: June 08, 2022
Record ID: nab4bz

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2019			
LAW	6000	Civil Procedure	4	B+	Woolhandler,Nettie A
LAW	6002	Contracts	4	A	Cohen,George M
LAW	6003	Criminal Law	3	A-	Bonnie,Richard J
LAW	6004	Legal Research and Writing I	1	S	Ware,Sarah Stewart
LAW	6007	Torts	4	A	Barzun,Charles Lowell
		SPRING 2020			
LAW	6001	Constitutional Law	4	CR	Prakash,Saikrishna B
LAW	6104	Evidence	4	CR	Ferzan,Kimberly
LAW	9200	Federal Litigation Practice	3	CR	O'Keeffe,James
LAW	6005	Lgl Research & Writing II (YR)	2	S	Ware,Sarah Stewart
LAW	6006	Property	4	CR	Harrison,John C
		FALL 2020			
LAW	8002	Bankruptcy (Law & Business)	4	A	Hynes,Richard M
LAW	6103	Corporations	4	B+	Hwang,Cathy
LAW	7018	Criminal Adjudication	3	B+	Brown,Darryl Keith
LAW	7071	Professional Responsibility	2	B+	Sachs,Benjamin Ryan
LAW	9081	Trial Advocacy	3	B+	Cook,John Tandy
		SPRING 2021			
LAW	7160	Computer Crime	3	B+	Bamzai,Aditya
LAW	6105	Federal Courts	4	A-	Re,Richard Macdonald
LAW	7086	Jurisprudence	3	A	Strauss,Gregg
LAW	8010	Patent Law	3	A-	Duffy,John F
LAW	7075	Quantitative Methods	3	A-	Fischman,Joshua
		FALL 2021			
LAW	9298	Appellate Practice	3	B	Stetson,Catherine Emily
LAW	7019	Criminal Investigation	4	A-	Coughlin,Anne M
LAW	6106	Federal Income Tax	4	A-	Hayashi,Andrew T
LAW	8628	Innocence Project Clinic (YR)	4	CR	Givens,Jennifer L
		SPRING 2022			
LAW	7021	Courts	3	B+	Law,David S.
LAW	8629	Innocence Project Clinic (YR)	4	B+	Givens,Jennifer L
LAW	7062	Legislation	4	A-	Nelson,Caleb E
LAW	7144	Negotiation	3	B+	Sachs,Benjamin Ryan

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 03, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Nachiketa Baru

Dear Judge Sanchez:

I am delighted to recommend Nachi Baru for a clerkship in your chambers. While I was on the Virginia faculty, Nachi was a student in my Spring 2020 Evidence class and then a research assistant for me during the summer of 2020. Nachi is bright and inquisitive, and I recommend him without reservation.

Because Virginia decided to convert classes to pass/fail for the Spring 2020 semester, I cannot make comparative remarks about Nachi's performance on my exam or his performance after we moved to remote teaching after spring break. That said, for the first two months of class, Nachi was a superb student. I teach Evidence using a casefile method, and students are required to represent clients in role. This requires substantial participation. Moreover, this methodology allows students to assess the purposes and the impact of various rules. Nachi was a masterful class participant. He was thoroughly prepared, and he was a student I could count on for an insightful remark that went to the heart of an evidentiary rule. He was clearly one of the best in the class.

I was thus delighted that Nachi was interested in serving as a research assistant for me that summer. I gave Nachi a project on the natural and probable consequences doctrine in criminal law, where accomplices can be responsible not just for the crime they intend to aid but those that flow naturally from them. I also asked him to follow up on case law development after the Supreme Court's Rosemond decision on accomplices' mental states. This research required the ability to identify fine-grained distinctions in the doctrine and to pay close attention to the relationship between facts and law. For this project, Nachi did a first-rate job. He is careful and serious. He works well independently but asks clarifying questions when necessary. And, he delivers a clear, crisp, and fluid work product.

I regret that my departure from UVA prevented me from continuing to have Nachi serve as my research assistant (as well as having him as a student in another class). I know my thinking would have benefitted from spending more time with him. In addition to being very smart, he is also simultaneously serious and congenial. He will make a great sounding board, and he will get along well with his co-clerks. I wholeheartedly recommend him to you.

Sincerely,

Kimberly Kessler Ferzan
Tel. 215-573-6492
kferzan@law.upenn.edu

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I understand that Nachi Baru, a graduate of our class of 2022, has applied for a clerkship in your chambers. I am thrilled to give Nachi my strong endorsement.

I worked with Nachi throughout all three years of his law school education. It was my pleasure to watch Nachi flourish and consistently contribute to our community throughout the course of his law school career. During his first and second years, Nachi volunteered for our Innocence Project pro bono clinic, receiving volunteer hours for his work. At the time, I supervised that clinic.

Even as a first-year law student, Nachi immediately began contributing valuably to his case team. Nachi was consistently one of the first students, if not the first student, to volunteer for tasks. Nachi is a true team player; he is willing to take on anything from contacting potentially hostile witnesses to navigating the bureaucracy of a Virginia prison to researching a complex legal issue regarding the viability of a habeas corpus claim. He flourishes doing legal research, which he clearly enjoys and always finished in a timely and thorough manner. His work product is clear and direct; he gets to the heart of the issue, and I always knew that I could rely on his conclusions.

I was thrilled when Nachi applied for the Innocence Project Clinic (our academic, for-credit clinic) for his third year – even more so when I became its Associate Director and one of two professors co-teaching the clinic. It was a joy to work with Nachi as he rounded out his legal education and used the skills that he had built over the prior two years in our clinic. As a student in the academic clinic, Nachi brought serious and thoughtful inquiries to our discussions. He was always prepared, attentive, and engaged. Much of a student's experience in the clinic is what the student decides to make of it. As he was in the pro bono clinic, Nachi was one of the first to volunteer when an assignment or piece of discrete research was offered up to the class. Nachi clearly took seriously both the opportunity to get from his education everything that he could and his responsibility to our clients.

Nachi is a steady presence. I cannot recall him ever missing a meeting, losing his patience, or being anything less than courteous to his peers. If I were a student working on any of these cases, I would always want Nachi to be a member of my team. He is consistent, trustworthy, and reliable. He can be soft-spoken and judicious with his opinions, but only because he is measuring a thoughtful and nuanced view before sharing it. His classmates clearly both respected and enjoyed him. He volunteered for years for the Honor System Committee, and he is precisely the kind of student who should be doing so. Nachi is conscientious and careful, but he is also compassionate and understanding.

Since graduating from law school, Nachi has reached out several times about pro bono work he is doing for his firm that relates to his work in our clinic. I am unsurprised that he has continued to seek out ways to help the wrongfully convicted. That Nachi has asked for guidance and input on postconviction matters is fitting: he has no ego preventing him from asking for help, he uses all resources available to assist his clients, and he has strong and lasting relationships because of his lovely disposition and because of the effort he puts into connecting with others. Recently, he visited Charlottesville to see friends and stopped by our offices. Everyone in the office was genuinely thrilled to see Nachi again, and his commitment to the work was obvious. He couldn't wait to find out what was happening in the cases he had worked on as a student.

Nachi would be an asset to chambers both in terms of his work product and his personality. As an unselfish team member, he will support his co-clerks when they are in need. He will produce thorough and solid written work product that you will not have to second guess. And he will bring a quiet, steady ease to chambers. I have no reservations about Nachi's ability to thrive in all aspects of a clerkship.

Sincerely,

Juliet B. Hatchett
Assistant Professor
Associate Director, Innocence Project at UVA School of Law

Juliet Hatchett - jhatchett@law.virginia.edu - (434) 243-1627

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to give Nachiketa Baru an enthusiastic recommendation for a judicial clerkship. Please consider this letter in connection with his application to your chambers.

I had the pleasure of teaching Mr. Baru in my patent law class in the spring of 2021. From my experience teaching Mr. Baru, I can recommend him as an excellent candidate for a judicial clerkship. He is a bright, responsible student who is unafraid to speak up. He was one of the best (and perhaps even the best) class participant in my 2021 patent law class. His enthusiasm, sense of humor and insightfulness made him a pleasure to have in the class. He also wrote a strong final exam that was more than sufficient to convince me he had learned patent law well.

My patent law class in the spring of 2021 was during the pandemic and thus was taught in an unusual fashion. It was a relatively small class of 18 students, with about one-third of the students taking the class in person wearing masks and two-thirds taking the class remotely via Zoom. Because of the need for social distancing, the class was taught in a normal sized classroom that would ordinarily seat over 60 students, with only about one in ten seats filled. Thus, the teaching environment was not conducive to classroom discussions, although given the small size of the class, it was perhaps not as bad for teaching as the large class that I taught during the same academic year.

One aspect of the course that definitely improved the environment for everyone—students and professor alike—was having Mr. Baru in the classroom. He was always at the ready to volunteer to answer my questions, to raise his own questions or to give insightful comments on his peers' questions and comments. To me, Mr. Baru was proof positive of that old adage that a single person can make a difference. From the very first classes, Mr. Baru was not bashful or self-conscious about speaking up and adding to the classroom experience. He was pretty much the perfect student in class—unfailingly polite and courteous to others, but also always ready and eager to engage in the material. After only a few classes, I had to be careful not to call on him too much. I was tempted to call on him so much because he was so enthusiastic and his comments were always so good. I would definitely rate him as one of the top 1-2% of students in terms of classroom participation—and I mean that percentage to be a measure of overall quality not mere frequency of participation.

By the end of the semester, I was convinced that Mr. Baru was among the strongest students in the class. On the final exam, he did very well, though perhaps just a bit shy of his superlative performance in the classroom. He achieved an "A-," which is a very good grade at UVa. I awarded only two As and one A+ in that particular class, and Mr. Baru's superlative class participation could have easily been the basis for awarding him a final grade of A. My grading policy, as stated in my syllabus, permits me to factor in class participation by awarding a final grade up to a one "grade step" above the exam grade (e.g., A- to A), and perhaps I should have done so in Mr. Baru's case. Yet I exercise my discretion to move final grades above the exam grade very sparingly, and I'm especially hesitant to exercise the discretion in a very small class.

Nevertheless, I definitely think of Mr. Baru as one of the best students in the class. In the past, I've recommended strong former students who received A- grades in my patent law class for federal clerkships, and they have been able to obtain really excellent clerkships (including Federal Circuit clerkships). Those former students have done well as clerks (as I'm told by the judges for whom they clerked). I'd easily put Mr. Baru in that same category. He has a very strong overall record of achievement here at UVa (with a GPA > 3.57); he was excellent in my patent law class; and he has an overall strong resume—including an undergraduate degree in a hard science from a great college (a neuroscience degree from Pomona College). I have no doubt that he would be an excellent law clerk.

Finally, I can assure you that, beyond his fine legal skills, Mr. Baru is someone whom you would really appreciate having in your chambers. He's very outgoing, affable, talkative and very enthusiastic about his legal studies. He would bring a lot of energy and analytic ability to your chambers. I have no doubt that he will be a great clerk and, ultimately, an excellent lawyer who will be a credit to our school.

If you have any questions regarding Mr. Baru or this recommendation, please feel free to contact me at (434) 243-8544 or at jfduffy@virginia.edu.

Sincerely,

/s/

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Difficulty, Uncertainty, and Harm: The Shortcomings of the Barzun and Gilbert Model of Constitutional Conflict Avoidance (Excerpt)

II. Summary

Barzun and Gilbert posit that, in hard Constitutional cases, courts/judges should look to apply a conflict avoidance model. This model would both assist and constrain judicial decision making, by forcing courts to make narrow, fact-bound decisions that are particular only to each individual case, without setting precedent on more abstract Constitutional doctrine. This would, in theory, constrain the breadth of a court's decisional jurisdiction while potentially blunting the role of ideology, given that judge's decisions would apply only to the parties at hand, and not establish broad precedent.

Barzun and Gilbert begin their analysis by making clear that conflict avoidance, as discussed above, should be applied only to those cases which are truly "hard". In other words, conflict avoidance is a tool to be employed in matters "where the demands of law and justice are unclear" and settled legal and moral precepts don't yield an answer.[1] Conflict avoidance is intended to strongly parallel the concept of the least cost avoider ("LCA") from tort law. In tort suits, the LCA paradigm holds that the costs of the underlying harm should be shifted onto the party who, from an ex-ante perspective, could have most easily prevented whatever harm occurred.[2] To translate the LCA framework from torts, where costs are predominantly economic, into the conflict avoidance model of Constitutional law, where the harms often speak to less material concerns, Barzun and Gilbert envision a three-step process.

The first step is to understand, in a given hard case, what the "particularized interests" of the parties in question are.[3] This involves reframing grand statements of Constitutional values into the more prosaic, instrumental concerns of the actual individual parties. Barzun and Gilbert offer a hypothetical of a high school student who wears a Confederate flag t-shirt to school.[4] The student may claim an interest in being able to express pride in their heritage, while the school principal who seeks to ban such a shirt may claim an interest in fostering an inclusive learning environment.[5] These concerns would stand in contrast to a suit under the more traditional model,

[1] Charles L. Barzun & Michael D. Gilbert, Conflict Avoidance in Constitutional Law, 107,VA. L. REV. 1 (2021), at 10.
[2] *Id.*, at 11.
[3] *Id.*, at 13.
[4] *Id.*, at 16.
[5] *Id.*

where both parties may attempt to invoke big-picture ideas like freedom of speech or equal protection. Attempting to draw out particularized interests in this way has the advantage, for Barzun and Gilbert, of putting the nature of the actual dispute into focus, allowing courts to avoid being tripped up by considerations of abstract ideals that are often not even justiciable.[6]

The next step in the analysis is to consider the respective avoidance costs borne by either party.[7] Courts must determine how costly it would have been for either party to entirely avoid the confrontation which led to the legal action in the first place.[8] Compared to the tort context, "costs" in Constitutional conflict avoidance might refer not just to economic burdens, but to the psychological toll suffered by individuals in the course of their avoidance.[9] Using an example of a gay couple denied service by a wedding florist, Barzun and Gilbert state that a court would have to consider the psychological costs borne both by the couple – who might have been hurt by the prospect of having to find a non-discriminatory florist – as well as the florist, who might have been psychologically distressed by having to "condone" the gay wedding by referring the couple to another florist.[10]

The third and final step of the conflict avoidance analysis is relatively straightforward. Once a court has inquired into the particularized interests of the parties and then weighed the costs both parties would have suffered if attempting avoidance, the court should rule in favor of the party who would have borne the higher cost, and against the party who could have more easily avoided.[11]

Barzun and Gilbert then apply their conflict avoidance model to certain paradigmatic Supreme Court cases, which in their view help illustrate the pragmatic benefits of their model. Among the positives of conflict avoidance, in Barzun and Gilbert's eyes, is that it would force courts to think more critically about the actual parties at the center of a given action, instead of allowing disconnected proxies to take center stage.[12] From a pragmatic perspective, Barzun and Gilbert believe that a conflict avoidance model would also disincentivize speculative litigation[13]

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[6] *Id.*, at 19-20.
[7] *Id.*, at 26.
[8] *Id.*
[9] *Id.*, at 28.
[10] *Id.*, at 28-29.
[11] *Id.*, at 30-31.
[12] *Id.*, at 34.
[13] *Id.*, at 38.

and lead to precedent that, while more narrow and fact-bound, would be more instructive in helping chart the further development of Constitutional rights.[14]

Thus, for Barzun and Gilbert the conflict avoidance doctrine of Constitutional law would serve as an important illuminating tool for hard cases. By stressing the need to evaluate particularized interests and individual harm, it would direct courts to consider the needs of the actual individuals involved in the litigation, as opposed to getting caught up in bigger-picture considerations. And by forcing such narrow factual analysis, the model can limit the uncertainty that might otherwise arise from courts attempting to apply indeterminate precedent. While Constitutional conflict avoidance has attractive components, however, it also contains certain jurisprudential assumptions which may not stand up to closer scrutiny, and reveal that the model may in fact increase, not decrease, the presence of ideological bias and legal uncertainty in hard cases.

III. Jurisprudential Assumptions of the Barzun-Gilbert Model

"Hard Cases"

From the start of Barzun and Gilbert's analysis, it is clear that many of their foundational assumptions parallel the assumptions found in the school of Legal Realism. For one, just as Barzun and Gilbert wish to restrict their conflict avoidance paradigm to "hard" Constitutional cases[15], Legal Realist analysis consciously focuses only on cases which have reached higher appellate review, evincing a heightened level of complexity.[16] For Legal Realists, what distinguishes these hard cases is that they are "rationally indeterminate", in the sense that "the available class of legal reasons does not justify a unique decision"[17], a classification that closely mirrors Barzun and Gilbert's own understanding of "hard" cases.[18]

Indeed, Barzun and Gilbert's first major assumption, even prior to the specific conflict avoidance analysis, concerns this delineation of "hard" cases from non-hard ones. Barzun and Gilbert spend little time exploring exactly *how* judges and courts might arrive at a determination

[14] *Id.*, at 41.
[15] *Id.*, at 17.
[16] Brian Leiter, "American Legal Realism," in *The Blackwell Guide to Philosophy of Law and Legal Theory*, W. Edmundson & M. Golding eds. 50, 53 (Blackwell, 2005).
[17] *Id.*, at 51.
[18] Barzun & Gilbert, *supra* note 1, at 8.

that a case is a hard case, apart from a brief gesture at notions of epistemic uncertainty.[19] There is no guidance on how courts might objectively arrive at a conclusion that a particular case implicates indeterminacy, and thus satisfies the label of a "hard" case. This task of delimiting "hard cases" is even more difficult because Barzun and Gilbert make both legal and *moral* indeterminacy prerequisites for finding a hard case.[20] The inclusion of this latter condition of moral indeterminacy might be a pre-emptive acknowledgment that many Constitutional law cases are not decided purely on legal grounds, but incorporate other political, social, and religious intuitions.

However, if it is difficult to clearly define a set of circumstances where the "demands of law" fail to yield an answer, it is even more difficult to see how courts may reliably decide that a case is also not resolvable by the "demands of justice".[21] Of course, one might fairly say that it will always be difficult to produce a complete, *a priori* definition of an amorphous concept like indeterminacy, which is by itself the subject of more than ample jurisprudential debate. In fact, this is a responsibility that Barzun and Gilbert specifically pass over, noting only that their project "does not depend" on arriving at a criterion for "hardness" and depends only on there being "a class of cases in which application of *whatever criteria the interpreter thinks proper* produces a hard case" (emphasis in original).[22]

This move on the part of Barzun and Gilbert is unsatisfying. One of the chief benefits of the Constitutional conflict avoidance model is presumably that it would force judges to shift their analysis from abstract ideological frameworks to the actual material concerns of the parties at hand. However, this view fails to grapple adequately with the potential for the hard case label to serve as an escape hatch of sorts. If one takes seriously the Legal Realist theory that judges often decide cases on the basis of individual idiosyncrasies[23], including political ideology, one can imagine judges who fear that their preferred side in a Constitutional case will lose under a more "mechanical" application of existing precedent suddenly deciding that a case is "hard" and that analysis must shift to the conflict avoidance model, where other factual considerations may give their more sympathetic litigant the advantage.

[19] *Id.*
[20] *Id.*, at 8.
[21] *Id.*
[22] *Id.*, at 10.
[23] Leiter, *supra* note 16, at 54.

There are echoes here as well of Frederick Schauer's more Formalistic concerns about "decisional jurisdiction".[24] Prior precedent, especially in Constitutional cases where precedents are often declarations about the fundamental rights of citizens, can be viewed as constituting rules which foster at least some baseline of predictability. These predictable rules may be inadequate at capturing all potential subtleties of all potential future factual permutations, but, as Schauer notes, knowing beforehand that a predictable rule will be applied fosters wider social confidence in a decisionmaker's decisional process.[25] Barzun and Gilbert's belief seems to be that their conflict avoidance model limits uncertainty by allowing judges to rule purely on the facts at hand without feeling the need to shoehorn their decisions into alignment with indeterminate precedents. However, a system that grants decisionmakers the ability to stray from applying prior rules in favor of a narrow case-by-case factual focus actually creates more space for unpredictable judicial discretion in the decisional process.[26] While some uncertainty is indeed generated when new facts are made to fit into seemingly inapposite old law, even greater uncertainty is created by granting judges the ability to simply disregard or elide over such prior rules in the course of their factual determinations.[27] Relieving judges of the obligation to try and apply prior rules might thus have the effect of increasing, not decreasing, the indeterminacy present in difficult cases.

The presence of this increased decisional power also brings up further fundamental questions about how judicial interpretation of "hard cases" might actually function. For example, can a trial court or lower appellate court's decision, made either by explicit announcement or implicit analysis, that a Constitutional case is "hard" serve as a binding observation upon higher courts, or are higher courts free to simply restart and decide for themselves if a case is "hard"? What happens when the ideological idiosyncrasies of a Supreme Court majority line up in such a way that it is motivated to label a case "hard" to get around applying or extending precedent it does not like? These more procedural concerns seemingly do not concern Barzun and Gilbert, or are otherwise assumed unimportant on their part. However, they do raise serious questions about the workability of the conflict avoidance model in the real world, and suggests that giving judges

[24] Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 540 (1988).
[25] *Id.*
[26] *Id.*, at 540-41.
[27] *Id.*

the discretion to delineate "hard cases" from determinate ones does not eliminate uncertainty from judicial decision-making, and in many cases may actually increase it.

Particularized Harms

The first step in the actual conflict avoidance model, as discussed in Part I, involves courts ascertaining the "particularized" interests which one or both parties have had frustrated in the underlying incident. For Barzun and Gilbert, these particularized interests are individual to each case and must be distilled and distinguished from more wide-ranging rights or interests that the parties at hand believe to have been violated.[28] In the case of the gay couple who are refused service by a wedding florist, for example, the particularized interest analysis would focus only on the couple's frustrated ability to procure flowers for their wedding, and would exclude consideration of their more abstract interest in receiving equal treatment to straight couples in society.[29] Barzun and Gilbert seem to assume that it is a relatively trivial step for courts to "set broad interests aside, and focus on the particularized interests whose satisfaction the other party frustrated or threatened to frustrate."[30] However, as they acknowledge, in many cases it is possible to identify a number of implicated interests, some of them broad and some narrow and particularized.[31] Even if one assumes that judges will put aside their ideological proclivities to reliably distinguish broad from particular interests – no small assumption in and of itself – it seems that they will still be left in many instances with a "menu" of several particularized interests to choose from. There is nowhere in Barzun and Gilbert's model where they indicate that litigants will have any explicit duty, perhaps through certain pleading requirements, to specify which interests – particularized or otherwise – are most vital to them. This would them seem to grant judges the ability to decide for themselves what narrow interests *they* believe the litigants have seen frustrated.

In fact, there is no requirement that any of the parties have to even *agree* with a court's framing of their particularized interest. Barzun and Gilbert might argue that this encourages courts to take a more "objective" posture, as opposed to depending on the parties' subjective expression of their own preferences. However, it seems difficult to disentangle the presence of an

[28] Barzun & Gilbert, *supra* note 1, at 19-20.
[29] *Id.*
[30] *Id.*, at 22.
[31] *Id.*, at 42.

objective interest from the subjective intent of the parties; it would seem strange, especially in a narrow, fact-bound case following the conflict avoidance model, for the court to be adjudicating a conflict based on terms that neither party feels accurately captures their interest. This once again also opens up Barzun and Gilbert to the kinds of Legal Realist critiques outlined previously. If judges can decide what the interests at stake "really" are, there seems a likelihood that they will choose to frame the competing interests in a way that favors the side they are already predisposed towards.

This kind of choice is not an inconsequential one, since not all narrow interests are weighed equally in every case. As Barzun and Gilbert concede themselves, different factual circumstances on the ground will make certain narrow interests more compelling and probative as to the final outcome than others.[32] In the case of the gay couple and the florist, one might imagine a judge sympathetic to the florist deciding to frame the narrow interests at play as "the interest in having decoration at one's wedding" versus "the interest in avoiding the all-consuming fear that one will be condemned by God for facilitating sin." Conversely, a jurist sympathetic to the couple might decide the relevant interests are "obtaining flowers from the best, most conveniently located florist in the area" versus "not having to be the person who must physically arrange the floral display at the wedding in question." Neither sets of formulations seem to violate the rule against abstract interests. While one might claim this type of re-wording is mere semantic shuffling, one can see how the animating sentiments behind the different framings, if not the actual verbal content of the framing itself, might lead to judges reaching particular decisions.

The concerns about excessive "decisional jurisdiction" touched upon previously also have relevance here. As articulated by Schauer, the concern with allowing decisional jurisdiction is the much greater "possibility of variance" that it injects into a judge's final decision.[33] Although Schauer's analysis is directed mainly towards issues of statutory interpretation, important parallels may still be drawn to Constitutional cases. Just as too much decisional jurisdiction "undermines predictability by allowing the determination of any of several purposes"[34], so too would Barzun and Gilbert's particularized harm model generate uncertainty

[32] *Id.*, at 42-43.
[33] Schauer, *supra* note 24, at 541.
[34] *Id.*

by granting judges the discretion in so-called "hard" cases to decide for themselves the interests that are "actually" at stake. As noted above, this determination can presumably be made without even accounting for the stated preferences of either party, which would seem to grant a judge free-wheeling discretion to craft their own articulation of the actual interests. While in some cases we might be satisfied with a judge's discernment, this grant of jurisdiction also "increases the likelihood of erroneous determinations"[35] or determinations that are too easily influenced by individual biases. This is not to say that the existing paradigm, where judges in difficult cases presumably attempt to eke out legal or moral determinacy in potentially indeterminate circumstances, always yields desirable results that are free from ideological predilections. However, it may accord the legal system a greater sense of stabilization and freedom from the personal proclivities of decision-makers[36], in the same way a more rote application of a rule may be preferable to entrusting judges with making case-by-case determinations of what the rule is "really" getting at.[37]

In other words, it is true that a judge's own idiosyncrasies will always play a role in how the terms of a particular legal matter are framed, implicitly or explicitly, and that these framings will often tend to be more favorable to one side over another. Under the current status quo, however, there is an extent to which judges must pay some deference to how the litigants themselves choose to frame the terms of the debate, even if the debate makes reference to concepts – like "equal dignity" or "religious liberty" – that are difficult to express in concrete terms. The Barzun and Gilbert model, by allowing judges to impose upon a case their own view of the heart of the conflict, leaves room for even greater judicial discretion, giving space for biased decisionmakers to wholly reconstrue the dispute in a way that tilts the scales in one direction more heavily. It also opens up the possibility for judges to "hide" the true underpinnings of their analysis, allowing them to make ideologically influenced decisions while using the "particularist" framing as a convenient fig leaf. In the more traditional model of Constitutional litigation, big ideological issues are, for better or worse, often presented front and center and considered explicitly, giving greater public clarity as to the true "why" behind a decision.

[35] *Id.*
[36] *Id.*, at 542 – 43.
[37] *Id.*, at 541.

One final objection with regards to the particularized harm analysis concerns those cases where the "narrow interests" at the heart of the litigants' dispute are inextricably wound up with the question of the existence of a broader Constitutional right. Barzun and Gilbert concede that some cases that fall in this category exist, using abortion as an example of a case where the narrow interest – an individual's desire to terminate their pregnancy – cannot be adjudicated separately from the wider question of whether that interest can even properly *exist* under the Constitution.[38] One can easily imagine other cases that are similar in nature. For example, an immigrant who is being deported but believes they are entitled to the deportation protections of the DACA "Dreamer" program has an interest – avoiding deportation – that cannot be decided separately from the broader question of whether DACA is a Constitutionally valid program that does in fact create a valid interest against deportation for some individuals. Similarly, one of the several cases that eventually fell under the banner of *Obergefell v. Hodges*[39] arose out of a situation where a gay couple, married in one state which recognized gay marriage, found that the union was not recognized as valid in another state. Once again, the narrow interest of the individuals – being able to obtain a valid marriage license in their state of residence – could not be separated from the broader claim of whether a Constitutional right to have such a marriage nationally recognized existed. Barzun and Gilbert acknowledge of course that their abortion example is not the only exception, but still hold that "their existence does not condemn the principle."[40] From a purely philosophical perspective, that might be true; the existence of exceptions or edge cases in any model or theory does not necessarily invalidate its power with respect to a majority of cases. However, it seems a not-insignificant assumption to believe that a model that fails when applied to such high-profile, paradigmatic examples can still maintain wider viability. If Constitutional conflict avoidance cannot answer the "big" questions, as it were, it seems unlikely that courts would keep it around to apply only to the "smaller" questions. A more likely outcome is that courts, out of a sense of both public credibility and internal consistency, will hold fast to whatever "worked" before, which would seem to leave conflict avoidance out in the dust.

[38] Barzun & Gilbert, *supra* note 1, at 45-46.
[39] 576 U.S. 644 (2015).
[40] Barzun & Gilbert, *supra* note 1, at 46.

Avoidance Costs

The next step of the Barzun and Gilbert conflict avoidance analysis requires the courts to make an ex-ante inquiry into what steps the relevant parties to the litigation could have taken to avoid the conflict at hand. This step reifies many of the assumptions already covered above, chiefly that judges will be able to reliably, with minimal interference from their own idiosyncratic biases, determine the narrowest interests harmed by both parties and faithfully reason backwards from there. Of greater interest in this section is Barzun and Gilbert's attempt to parse out the effect of "dignitary harms", an acknowledgment on their part that in many of the kinds of cases that implicate deep Constitutional questions, the harms are not merely economic, but implicate vague yet real feelings about equality, respect, and other intangible values.[41] Under the banner of dignitary harms, Barzun and Gilbert focus particularly on "psychological harms", which arise when a certain course of action causes "emotional pain and anguish" to the acting party.[42]

Barzun and Gilbert assume that courts can simply borrow the "reasonable person" standard of torts to determine how much psychological harm a particular course of avoidance might have caused to an individual.[43] It is far from clear, however, that such a standard can be easily transplanted in that way, in part because it seems likely that a judge's ideological priors would heavily influence the extent to which they are willing to impute psychological harm to the parties in question. One can certainly imagine a judge unsympathetic to gay marriage – or at least, more sympathetic to parties asserting religious freedom claims – deciding that the psychological avoidance cost suffered by a florist when they tacitly participate in a gay wedding by assigning the job to a subordinate still outweighs the psychological harm the couple would have felt by having to take their business elsewhere. Barzun and Gilbert seem to believe that such fuzziness in the calculation of these "emotional sensitivities" would be no greater in a Constitutional law context than in torts.[44] While it is true that ascertaining psychological harm when determining, say, pain and suffering will always have ambiguity even in the realm of torts, the danger in the Constitutional context is that judges will be tempted to feel that the party they are already sympathetic to has suffered the worse psychological harm.

[41] *Id.*, at 27.
[42] *Id.*, at 23.
[43] *Id.*, at 29.
[44] *Id.*

Barzun and Gilbert try to get around this problem by positing that, in most cases, the psychological harms will "cancel out" between the parties, and that the cases in which one party's harm "clearly outpaces" the other will likely not meet the threshold to be considered a hard case anyway.[45] But it does not follow that a case will be legally or morally determinate – and thus not "hard" – simply because there appears on the surface to be differing levels of psychological harm. Barzun and Gilbert's conception of legal claims in this regard has strong similarity's to Joseph Raz's Interest Theory, which posits that the existence of a legal right can be predicated on the relative strength of an individual's interest in the matter.[46] It is this intuition that Barzun and Gilbert seem to be channeling when they say that unequal psychological harms will render a case determinate. If one party's psychological or emotional harm is clearly greater than the other, then that affected party would seem to have a greater moral interest in having their right recognized as the basis of a valid legal claim.[47] However, the utilitarian rebuttal to this theory notes that, when the weight of interests in one case favors establishing a particular duty, there is a "wave" effect, whereby the resolution of that legal claim then confers duties and rights on other parties as a kind of outward chain reaction or domino effect.[48] Thus, cases where the immediate parties have differing levels of psychological harms may still constitute a hard case, if there is legal indeterminacy about how the duties and rights of other parties are likely to be effected by a finding for one party.

Similarly, there is no need for one party's harm to "outpace" another for the decision to be subject to a judge's ideological priors. A judge who is predisposed to take claims of violation of religious liberty more seriously than claims of anti-LGBT discrimination may still acknowledge that a gay couple would have been psychologically harmed by avoidance. But that might not prevent them from succumbing to their biases and tipping the balance of harms in their mind just enough in the florist's favor. Again, it is no new observation to state that judges often bring their own personal opinions to bear when deciding the outcome of a case. What these objections do indicate is that the purported benefits of the conflict avoidance model are far from certain, and that the insistence that judges focus only on the concrete harms of the parties at hand does not guard against the ills that Barzun and Gilbert might hope it does.

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[45] *Id.*, at 29-30.
[46] Thomas Waldron, *Rights in Conflict*, 99 Ethics 503, 504 (1989).
[47] *Id.*
[48] *Id.*, at 508.

Comparing Avoidance Costs

The final step of the Barzun and Gilbert analysis is the briefest and seemingly least jurisprudentially complex. Having ascertained the particularized interests at harm, and the avoidance costs the plaintiffs would have incurred by pursuing those interests a different way, the courts should decide in favor of the party whose avoidance costs would have been higher.[49] This final step, however, seems to rest on perhaps the most fundamental of Barzun and Gilbert's assumptions, which is that courts and the legal system should, through this new decisional calculus, *discourage* least cost avoiders in Constitutional hard cases. That this should be the case is far from clear. Imagine that, during the Civil Rights movement, Rosa Parks decided to bring suit against the city of Montgomery following the infamous incident where she was asked to change her seat on a public bus. Say that the courts, after deciding the case to be "hard", decided that Parks' particularized interest of "not moving seats on the bus" could have been more easily met through avoidance than the city government's interest of "minimizing strife between passengers on a public accommodation". Would we say then that a decision which found against Parks would be just, or would constitute an acceptable message for the judiciary and society to send out to other similarly situated plaintiffs? Intuitively, the answer to that would be a resounding no.

Barzun and Gilbert might say that, under their model, the upside is that such a decision against Parks would not serve as "precedent" in the legal sense, and that the courts would be able to find in favor of another Parks-like plaintiff in another fact-bound case where the circumstances might be against the government's favor. But it is questionable how well the public would be able to internalize such legalistic line-drawing. A more likely outcome, it seems, is that similarly situated plaintiffs would see the decision as foreclosing on their highly similar claims, thus leading to an avoidance of the courts. Again, that may be Barzun and Gilbert's aim, to have vexing social questions resolved by means other than resorting to courts with unpredictable ideological leanings. If it is, Barzun and Gilbert fail to make such an argument explicitly, and instead seem content with a model which would discourage many least cost avoiders from pursuing their claims, no matter how symbolically significant.

[49] Barzun & Gilbert, *supra* note 1, at 30-31.

Applications

The final portion of Barzun and Gilbert's article retroactively applies their model to prior Supreme Court decisions which they identify as potential Constitutional "hard" cases. In the process of such application, they make further assumptions which serve to undermine the feasibility of the conflict avoidance model in the real world. One of the cases discussed is that of *Burwell v. Hobby Lobby*[50], a case in which the federal government stepped in as a party on behalf of individual Hobby Lobby employees attempting to reverse the company's policy of not covering certain contraceptives through its employee health insurance.[51] For Barzun and Gilbert, a benefit of the conflict avoidance model is that, in *Burwell* and similar cases, the court would be obliged to look past the government's role as a litigant, and instead inquire as to the particularized interests and costs of the actual employees themselves.[52] Barzun and Gilbert seem to believe that, at least in *Burwell*, such considerations might have led to a decision more favorable to the employees.[53] However, this ignores the possibility that in such cases, courts will actually be *more* inclined to take their judging role seriously when "important" parties like the federal government are able to step in and make the case that the court's decision will have wider implications that must be carefully considered. Instead of being more sympathetic, in cases like *Burwell* it may very well be the case that focusing solely on the parties with "particularized harm" make their concerns seem more trivial and easily dismissed.

Barzun and Gilbert also make that point, that, under their model, precedents made by courts would be limited in scope, and would be highly specific to the bespoke factual contexts of each dispute.[54] In other words, whether a gay couple can properly compel a florist or wedding cake baker to serve them might rely on whether or not easily accessible alternative vendors are nearby; if they aren't, the gay couple might prevail, but if there are alternatives at hand, the couple may lose.[55] In response to the objection that such narrow holdings do little to advance the development of workable precedent, Barzun and Gilbert posit that "over time", such cases "may settle into identifiable classes" that will be able to guide courts in future matters. This is in a way a display of faith in common law analysis, but fails to consider that, again, without a clear

[50] 573 U.S. 682 (2014).
[51] Barzun & Gilbert, *supra* note 1, at 32.
[52] *Id.*, at 33-34.
[53] *Id.*
[54] *Id.*, at 40-41.
[55] *Id.*

precedent to restrain them, judges will selectively analyze these narrow holdings in a way that is more susceptible to ideology than the average torts case might be. And there is no requirement or suggestion that, after a certain critical mass of narrow precedent has accumulated, that courts will or should be able to formulate a wider prospective rule that restricts the scope of decision-making in similar future cases. This is another arena where the Barzun and Gilbert model opens the door for judicial discretion. While it may be the case that the existence of broad Constitutional precedent is not ideal – especially in cases where one disagrees with the nature of the precedent – it means that we "give up some possibility of improvement in exchange for guarding against some possibility of disaster."[56] We might be unsatisfied with a hard and fast rule that seems to lack appropriate nuance to all possibilities, but we are likely to be even more unsatisfied by a paradigm which allows judges to craft their own rule on a case-by-case basis, borrowing selectively from precedent without even some of the small limitations which exist in the traditional framework.[57]

Another example considered by Barzun and Gilbert is the case of *Brown v. Board of Education*.[58] For Barzun and Gilbert, the conflict avoidance model would have still favored the plaintiffs in that case, primarily because "short of relocating to an integrated state", the plaintiffs could not pursue their interest in pursuing education in an integrated setting which did not impose the dignitary harms of making them seem like second-class citizens.[59] But what if the plaintiffs in that case lived on a state border, next to an integrated state and an integrated school district in that state which would have been happy to take them? Under the conflict avoidance model, it is at least conceivable that a court could have decided those plaintiffs' avoidance harms would have been lesser than the "harms" suffered by white students who would have been forced to create their own private schools to avoid the psychological distress of integration.[60] Not only would such a "narrow, fact-bound" holding in that case been deeply contrary to our sense of justice but, similar to the Rosa Parks example discussed above, it seems likely that it would have had a dampening effect on the desire of other black students to assert their rights.

[56] Schauer, *supra* note 24, at 542.
[57] *Id.*, at 541.
[58] 347 U.S. 483 (1954).
[59] Barzun & Gilbert, *supra* note 1, at 50-51.
[60] *Id.*

Applicant Details

First Name	**Hanna**
Middle Initial	**R**
Last Name	**Bayer**
Citizenship Status	**U. S. Citizen**
Email Address	**bayerh@lawnet.uci.edu**
Address	**Address** Street **68104 Verano Road** City **Irvine** State/Territory **California** Zip **92617** Country **United States**
Contact Phone Number	**2032526335**

Applicant Education

BA/BS From	**Bates College**
Date of BA/BS	**May 2017**
JD/LLB From	**University of California, Irvine School of Law** **http://www.law.uci.edu**
Date of JD/LLB	**May 6, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of International, Transnational, and Comparative Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**UC Irvine Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Rosenbaum, Mark
mrosenbaum@publiccounsel.org
Hasen, Richard
hasen@law.ucla.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Hanna Bayer
68104 Verano Road, Irvine, CA 92617 | (203) 252-6335 | bayerh@lawnet.uci.edu

May 24, 2023

The Honorable Juan R. Sánchez
Chief Judge
United States District Court for the District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez,

I am a May 2023 graduate of the University of California, Irvine School of Law (UCI Law); and I am writing to express my interest in clerking in your chambers for the term starting September 2024. I would be honored to assist in the work of your chambers and hope to have a career as dedicated to public service as your own. I am applying to clerk in your chambers because I am interested in working on a heavy civil rights and criminal docket. I am also eager to move back home to the Northeast, and I would love the opportunity to live in the same city as my best friend and college roommate. Generally, I am interested in clerking because I want to hone my research and writing skills while being exposed to both the litigation process and a wide variety of legal issues. I believe that my training at UCI Law, work experience, and incoming judicial law clerk experience show that I will be a productive addition to your chambers and that I possess the necessary skills and experience to succeed as your clerk.

As a law student pursuing a career in litigation, I have sought out various opportunities to work on active cases. During the fall 2021 semester, under the supervision of the Clinical Director and Founder of UCI Law's Criminal Justice Clinic, I represented clients in misdemeanor and post-conviction relief cases in the state of California, and a client in a compassionate release case in the Eleventh Circuit. By developing a strong command of the facts of the case and the law, a colleague and I wrote and won a motion for compassionate release in the Eleventh Circuit. Both experiences improved my ability to deliver quality legal writing under a significant time constraint. This past year, I have gained additional practical experience in UCI Law's Advanced Civil Rights Clinic, where I was part of the team that won the appeal against the Orange County District Attorney over the county's DNA collection scheme. By performing extensive research on relevant case law and statutes, I helped draft the reply brief to the California Court of Appeals and helped prepare the first chair attorney for their oral argument. The practical litigation skills that I have developed and will continue to develop by Fall 2024 will benefit your work.

My endeavors in law school provided practical experience that will make me an effective and efficient law clerk. During my third year in law school, I participated in a year-long course designed to imitate the Supreme Court life-cycle titled Supreme Court Litigation. In this course, I wrote four research papers, including a Petition for Certiorari and a Merits Brief, and I argued my case in front of the "Supreme Court." As a research assistant for Professor Richard Hasen, I researched conduct that merits punitive damages across the states as well as what standard of proof should apply for the Restatement (Third) of Torts. As a research fellow in the UCI Law Lawyering Skills Program, I assisted Professor Grace Tonner by providing verbal and written feedback and corrections for first-year students' papers and oral arguments. The ability to critique legal writing will help me produce clear, cohesive, and persuasive work as your clerk as I incorporate the techniques I encountered as a research fellow. Cumulatively, these experiences have and will prepare me to be an asset in your chambers. I am dedicated to improving my strong foundation in legal research and writing, all while being sensitive to strict deadlines, conducting efficient research, and completing precise work product.

I would be honored to contribute my practical litigation skills, attention to detail, and enthusiasm to your chambers as a clerk. Attached are my resume, law school transcript, writing sample, and letters of recommendation. Thank you for your time and consideration.

Sincerely,

Hanna Bayer

Hanna R. Bayer

68104 Verano Road, Irvine, CA 92617 | (203) 252-6335 | bayerh@lawnet.uci.edu

EDUCATION

University of California, Irvine School of Law, Irvine, California; Juris Doctor, May 2023

Honors: Dean's Award (second-highest performance in course): Torts; Pro Bono High Honors Award (200+ cumulative pro bono hours); UCI Law Legacy Award; Pro Bono Leadership Award

Activities: Journal of International, Transnational, and Comparative Law, *Staff Editor*; National Lawyers Guild, *Board Member*; Mental Health Law Society, *Co-Chair*; National Disability Law Student Association, *Events Chair*; Moot Court, *Competitor*; UCI Law *Community Fellow*; Dean Parrish's Advisory Council, *Social Media Advisor*

Pro Bono: Al Otro Lado, Inc., *Border Rights Project Student Leader*; Lawyers' Committee for Civil Rights of the San Francisco Bay Area, *Volunteer*; Kids In Need of Defense, *Volunteer*

Bates College, Lewiston, Maine; Bachelor of Arts, Philosophy, Studio Art: 2D Art, May 2017

Thesis: Philosophy: *Connecting Buddhist Ethics and Western Feminist Theory*; Studio Art: 2D Art: *They Don't See Me*

Activities: Student Support Network, *President*; WRBC Radio, *Event Planner*; Study Abroad in Rome (Spring 2016)

EXPERIENCE

United States Bankruptcy Court for the Central District of California, Riverside, California September 2023 – August 2024

Judicial Law Clerk. Incoming term law clerk to the Honorable Mark D. Houle.

University of California, Irvine School of Law, Irvine, California August 2022 – May 2023

Advanced Civil Rights Litigation Clinical Student. Working in small groups in the litigation of pending cases involving a range of substantive issues under federal and California civil rights and criminal law. Cases include *Thompson v. Spitzer*, a case filed by the clinic challenging the Orange County District Attorney's "Spit and Acquit" program and its creation of a DNA repository without any safeguards. Appeal was granted in April 2023.

ACLU of Southern California, Los Angeles, California September 2021 – December 2022

Part-Time Intern; Former Summer Intern; Former Pro Bono Volunteer. Under the supervision of a senior staff attorney on First Amendment and Democracy team, I conduct legal research and draft memos for ongoing litigation and policy projects. During 2021-2022 school year, analyzed evidence and drafted demand letters for the Economic Justice Project of the ACLU to the Department of Justice. Completed extensive research on the child welfare system and drafted a policy paper as well as a demand letter as part of the LGBTQ, Gender, and Reproductive Justice Project.

University of California, Irvine School of Law, Irvine, California January 2022 – May 2022

Research Assistant to Chancellor's Professor Richard L. Hasen. Assisted with research for the Restatement (Third) Torts: Remedies project, including remedies for various torts.

University of California, Irvine School of Law, Irvine, California September 2021 – December 2021

Criminal Law Clinical Student. Under the supervision of my Professor, represented an incarcerated individual in their Eleventh Circuit motion for compassionate release. Compassionate release was granted in late July 2022. Reviewed use of force cases for potential re-prosecution. Represented indigent clients charged with misdemeanors in local state court and individuals seeking post-conviction relief.

University of California, Irvine School of Law, Irvine, California September 2021 – May 2022

Research Fellow to Distinguished Professor Grace C. Tonner. Assisted first-year law students with legal writing assignments.

The Legal Aid Society of New York City, New York, New York May 2021 – Aug. 2021

Civil Rights Practice Extern, Immigration Law Unit. Analyzed laws for Emergency Order to Show Cause requesting expedited Guardianship Hearing and Special Findings Hearing in Family Court. Wrote Attorney Affirmations, Memorandum of Law in Support of Motion to Waive Fingerprints and State Central Registry Check, affidavits, and Motion for Special Findings. Researched and drafted country conditions evidence, declaration, and pre-hearing brief.

Blue Cross Blue Shield of Massachusetts, Boston, Massachusetts January 2020 – May 2020

University Relations Manager. Built and facilitated relationship with recruiting agency and managed two recruiters to identify diverse talent for mentorship initiative between current employees and interns.

UiPath, Framingham, Massachusetts/New York, New York March 2018 – December 2019

Talent Acquisition. Trained new hires and presented recruiting strategies to senior leaders. Led team of two recruiters, and collectively hired 45 interns across five offices around the country.

SKILLS AND INTERESTS

Intermediate proficiency in Italian and Spanish. Interests include painting, reading, swimming, and watching Marvel movies.

(Printer-Friendly)

********* THIS IS NOT AN OFFICIAL TRANSCRIPT *********

Previous Degrees

B.A. 05/17 BATES COLLEGE

Memoranda

LAW 501 - DEANS AWARD - SPRING 2021
PRO BONO - 50 HOUR AWARD - 2020-21
PRO BONO - 100 HOUR AWARD - 2021-22

2020 Fall Semester

COM LAW: CONTRACTS	LAW	500	4.0	B	12.0	
PROCED ANALYSIS	LAW	504	4.0	B	12.0	
LAWYERING SKILLS I	LAW	506A	3.0	B	9.0	
LEGAL PROFESSION	LAW	507	4.0	B	12.0	
LEG RESEARCH PRAC	LAW	508	1.0	S	0.0	SU
Term Totals	**ATTM: 15.0**	**PSSD: 15.0**		**GPTS: 45.0**		**GPA: 3.000**
Cumulative Totals	**ATTM: 15.0**	**PSSD: 15.0**		**GPTS: 45.0**		**GPA: 3.000**

2021 Spring Semester

COMMON LAW: TORTS	LAW	501	4.0	A+	17.2	
STATUTORY ANALYSIS	LAW	503	3.0	A	12.0	
LAW SKILLS II	LAW	506B	3.0	B+	9.9	
INT'L LEG ANALYSIS	LAW	505	3.0	B	9.0	
CON ANALYSIS	LAW	502	4.0	B	12.0	
Term Totals	**ATTM: 17.0**	**PSSD: 17.0**		**GPTS: 60.1**		**GPA: 3.535**
Cumulative Totals	**ATTM: 32.0**	**PSSD: 32.0**		**GPTS: 105.1**		**GPA: 3.284**

2021 Fall Semester

EVIDENCE	LAW	514	3.0	B	9.0	
DISABILITY RIGHTS	LAW	5683	2.0	A	8.0	
CRIM JUST CLINIC	LAW	597M	6.0	A	24.0	
RESEARCH FELLOW	LAW	298T	2.0	S	0.0	SU
PART-TIME EXT SUM	LAW	597X	4.0	S	0.0	SU
Term Totals	**ATTM: 11.0**	**PSSD: 11.0**		**GPTS: 41.0**		**GPA: 3.727**
Cumulative Totals	**ATTM: 43.0**	**PSSD: 43.0**		**GPTS: 146.1**		**GPA: 3.398**

2022 Spring Semester

BUSINESS ASSOCIATIN	LAW	511	3.0	S	0.0	SU
LAW OF SALES	LAW	5166	2.0	A-	7.4	
CRIM PROCEDURE	LAW	513	3.0	B+	9.9	
CONFLICT OF LAWS	LAW	572	2.0	B+	6.6	
RESEARCH FELLOW	LAW	298T	2.0	S	0.0	SU
Term Totals	**ATTM: 7.0**	**PSSD: 7.0**		**GPTS: 23.9**		**GPA: 3.414**
Cumulative Totals	**ATTM: 50.0**	**PSSD: 50.0**		**GPTS: 170.0**		**GPA: 3.400**

2022 Fall Semester

LEG ANALY & WRITING	LAW	5170	1.0	S	0.0	SU
REMEDIES	LAW	518	4.0	A-	14.8	
SUPREME CRT LIT	LAW	5940	3.0	IP	0.0	
AD CR LIT CLINIC	LAW	597AL	2.0	A	8.0	
DIRECTED RESEARCH	LAW	299	3.0	A	12.0	
Term Totals	**ATTM: 9.0**	**PSSD: 9.0**		**GPTS: 34.8**		**GPA: 3.867**
Cumulative Totals	**ATTM: 59.0**	**PSSD: 59.0**		**GPTS: 204.8**		**GPA: 3.471**

INCOMPLETE GRADES:	0	**UNITS:**	0.0
NR GRADES:	0	**UNITS:**	0.0
P/NP GRADES:	0	**UNITS:**	0.0
S/U GRADES:	6	**UNITS:**	13.0
W GRADES:	0	**UNITS:**	0.0

GRADE UNITS ATTEMPTED	59.0	**GRADE POINTS**	204.8	**UC GPA**	3.471
TOTAL UNITS PASSED	59.0	**UNITS COMPLETED**	72.0		

********* THIS IS NOT AN OFFICIAL TRANSCRIPT *********

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Hanna Bayer was a student in the first year Constitutional Analysis class I teach at UC Irvine School of Law during the spring semester 2021. We study principal doctrinal subject areas with an emphasis on methodologies for decision making, coherence of reasoning, and relationships among the different areas. I assign all major cases as well as briefs, oral argument transcripts, and relevant historical and social science materials. I've taught the course seven years at UCI and a subsection of it, Fourteenth Amendment, for 21 years at the University of Michigan Law School.

Hanna was one of the most impressive students in our class discussions. She was always fully prepared, meaning that she had not just read the assignments, but had carefully thought about the implications of the majority and dissenting opinions. I frequently called on her because I knew her analyses were helpful for the class to consider: well stated and defended, but sensitive to opposing positions. Hanna's ideas and questions sparked meaningful conversations with other students.

It was not unusual for Hanna to return to cases we examined when she came across later decisions that seemed hard to reconcile together. Often she would do serious digging on her own. She has an active mind that treats the law with respect and a healthy curiosity.

Please contact me if you have any questions.

Sincerely,

Mark Rosenbaum
Visiting Professor of Law
UC Irvine School of Law

Mark Rosenbaum - mrosenbaum@publiccounsel.org

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to highly recommend Hanna Bayer, who has applied for a clerkship in your chambers. I have known Hanna since the spring of 2021, when she was a student in my Common Law Analysis: Torts course. She earned an A+ in the course and received a Dean's Award recognizing the second highest grade in the course, writing an excellent final exam.

Hanna was my student when I taught Torts in an online-only format during the height of the pandemic. Teaching on Zoom was not easy; being a first-year law student was considerably harder. It was much more difficult for students to get to know their professors and classmates, and engage in the kind of informal interaction that helps solidify one's knowledge and socialization in the profession. I confess that I got to know most of my students that year much less well than I normally would.

But despite covid-related adjustments, I got to know Hanna quite well. Her enthusiasm for the subject matter was infectious; she had great passion for Torts, and for the law generally. She asked good clarifying questions and was one of the students I could count on when we encountered particularly difficult course material. Her written performance demonstrated her mastery of Torts and ability to write logically and persuasively.

I turned to Hanna last semester when I needed help in my work as co-Reporter for the Restatement, Third, Torts: Remedies project. Hanna researched and prepared a memo for me on the standards that states use to determine when conduct is bad enough to merit the award of punitive damages. She also compared the treatment that states use to the standards set forth in the Second Restatement. The memo was thorough, careful, and well-written. Hanna uncovered an important trend in state courts of which I was unaware: the use of the standard the Supreme Court has articulated in reviewing the amount of punitive damages for constitutional excessiveness to determine whether conduct is reprehensible enough to merit an award of punitive damages in the first place. I am confident that the Restatement sections on punitive damages will benefit greatly from Hanna's excellent research assistance.

Hanna's other experiences will well prepare her for a clerkship in your chambers, including her experience in the criminal law clinic and as a summer intern working on First Amendment issues at the ACLU of Southern California. Her extensive pro bono work not only has given her valuable legal experience but also shows her commitment to the cause of justice.

In sum, I think Hanna will be an excellent clerk in your chambers. I hope you will give her application serious consideration.

Please let me know if you have any further questions.

Very truly yours,
Richard L. Hasen

Richard Hasen - hasen@law.ucla.edu